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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 24

VICTOR J. HERB, PETITIONER,

vs.

NORMAN B. PITCAIRN AND FRANK C. NICODEMUS, JR., RECEIVERS FOR WABASH RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

PETITION FOR CERTIORARI FILED FEBRUARY 9, 1944.

CERTIORARI GRANTED MARCH 27, 1944.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

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[fol. a] [Caption omitted]

[fol. 1]

IN THE SUPREME COURT OF ILLINOIS, MAY TERM, A. D. 1943

VICTOR J. HERB, Plaintiff-Appellant,

vs.

NORMAN B. PITCAIRN and FRANK C. NICODEMUS, JR., Receivers for Wabash Railway Company, a Corporation, Defendants-Appellees

Appeal from the Circuit Court of Madison County, State of Illinois

Hon. D. H. Mudge, Trial Judge

Abstract of Record—Filed April 20, 1943

Placita and convening order of the Circuit Court of Madison County, Illinois, May 25, 1942.

Transcript of Proceedings in the City Court of Granite City, Illinois

(Filed in the Circuit Court of Madison County, Illinois, July 31, 1942)

STATE OF ILLINOIS,
Madison County,
City of Granite City, ss:

At a regular term of the City Court of Granite City, County of Madison and State of Illinois, begun and held [fol. 2] at the city court rooms, in and for said city, in said County of Madison, on Monday, the 1st day of June, A. D. 1942, it being the first Monday of June, A. D. 1942, in pursuance of law, by the Hon. Wesley Lueders, Judge of said court, the following proceedings were had, to wit:

Present: Honorable Wesley Lueders, Judge. W. R. Wittman, Sheriff. William C. Burton, State's Attorney. Alvah N. Homan, Clerk.

VICTOR J. HEER, Plaintiff,

vs.

NORMAN B. PITCAIRN and FRANK C. NICODEMUS, JR., Receivers for the Wabash Railway Company, a Corporation, Defendants

Civil Action at Law. No. 4053

ORDER DENYING MOTION TO DISMISS

Feb. 16, 1938: Motion to dismiss presented and argued. Motion denied—Defendants except—Rule on defendants to answer on or before February 28th, 1938.

ORDER TO SHOW CAUSE

February 26th, 1938: Order to show cause as per written form on file. (See Order)

ORDER TO PRODUCE CERTAIN DOCUMENTS

March 19, 1938: It is ordered that the defendants produce certain documents, all as per written order on file. (See Order)

MINUTE ENTRIES OF TRIAL

Oct. 13, 1938: Plaintiff is given leave to file reply to defendants' answer same filed instanter. Case called for trial, both sides announce ready Jury chosen, elected and [fol. 3] duly sworn to try the issues; Attorneys make opening statements for their respective sides. Trial proceeds with evidence on behalf of the plaintiff; with evidence still in progress on behalf of plaintiff Court adjourns until 9 a. m. Friday October 14, 1938.

Oct. 14, 1938: 9 a. m. Court convened and trial of case resumed with evidence on behalf of the plaintiff; Plaintiff rests. And defendants tender motion for instructed verdict, and judgment thereon is reserved. Trial proceeds with evidence on behalf of the defendants; Defendants rest. Plaintiff offers no evidence in rebuttal. Case closed as to evidence. Defendants renew motion for instructed verdict

in its behalf. Judgment reserved thereon as before. Court confers with Attorneys on Instructions. Attorneys argue to jury, Their respective sides of the case. The Court instructs the jury as to the law and the forms of verdict. Jury retire in charge of a sworn officer to consider of their verdict. Sealed verdict agreed upon and polling of the jury is expressly waived.

VERDICT

Oct. 15, 1938: Verdict of the Jury: "We, the jury, find the issues in favor of the plaintiff and fix the amount of his recovery at $30,000.00."

Nov. 17, 1938: Plaintiff's exhibits F & G removed by defendant's attorney Wesley Lueders.

Nov. 30, 1938: Motion heretofore submitted by Defendants for instructed verdict in its favor are taken up and argued at length by counsel for the respective parties. The Court now takes said matter under advisement pending submission and examination of authorities.

[fol. 4] ORDER GRANTING DEFENDANTS' MOTION FOR DIRECTED VERDICT; JUDGMENT

October 13, 1939: The Court having considered at length the briefs of legal authorities submitted by counsel; and the cases dealing with subject matter of this suit; and being now well and sufficiently advised in the premises, grants the motion of defendants for a directed verdict herein, in their favor as heretofore tendered, and taken under advisement by the court; and in as much as the jury in the trial of this case has in the meantime, returned a verdict in favor of the plaintiff, in the sum of $30,000.00; The Court doth now render judgment Non obstante Veredicto in favor of the defendants and against the plaintiff in bar of further action, and for costs to which action and ruling of the Court, Plaintiff excepted, excepts and continues to except. Written opinion of presiding Judge Wm. P. Boynton filed.

NOTICE OF APPEAL

October 25, 1939: Notice of appeal on the part of Plaintiff filed.

October 28, 1939: Acknowledgment of receipt of copy of Notice of Appeal filed and affidavit of service of Notice of Appeal on Attorneys for defendants, filed.

Order Fixing Amount of Bond

Petition for order fixing amount of Appeal bond filed. Praecipe for record filed Upon petition of Plaintiff in the matter of Appeal from the order of the Court herein, Oct. 13, 1939, the Court now fixes the amount of the appeal bond to be given by plaintiff for appeal to the Appellate Court of the Fourth District of Illinois, at the sum of Five Hundred ($500.00) Dollars, with surety to be approved by the Clerk of this Court.

Nov. 1, 1939: Affidavit of service of Praecipe for record upon Defendants' Attorneys filed.

[fol. 5] November 9, 1939: Appeal bond filed and approved by the Clerk of this Court leave given George D. Burroughs attorney for defendants to withdraw plaintiff's exhibits "A", "C", "D" and "E".

Order Redocketing Cause, etc.

Nov. 25, 1941: Motion of Plaintiff to re-docket this cause pursuant to the provisions of the Statute, upon mandate of Appellate Court for the Fourth District of Illinois; Its transcript and order reversing the judgment of this Court in said suit, is presented and allowed, and said cause is hereby redocketed as per order this day approved and directed to be filed and enrolled. Defendants file their motion to dismiss this suit, on the ground the Court is without jurisdiction of the subject matter, same is submitted by attorneys on briefs without argument, and is by the Court taken under advisement: This day Attorneys for plaintiff file their written motion for judgment in favor of the plaintiff upon the verdict of the jury herein, the Court reserves consideration thereof for future action.

Minute Entry of Arguments

June 30, 1942: Plaintiff's motion for judgment upon the verdict, filed herein November 25th 1941, is by the plaintiff withdrawn; Court hears arguments for and against the granting of Plaintiff's motion for change of venue from the City Court of Granite City to the Circuit Court of Madison County, Illinois, and takes same under advisement in connection with motion by Defendants to dismiss suit, pending the submission of briefs and consideration of legal principles involved.

ORDER GRANTING MOTION FOR CHANGE OF VENUE, ETC.

July 17th 1942: The Court having considered of the legal authorities submitted by the attorneys for and against the granting of the motion of Plaintiff for a change of venue in this cause, from this court: to the Circuit Court of Madi-
[fol. 6] son County, Illinois: and being now well and sufficiently advised in the premises, doth grant said motion, and change the venue of said cause to said Circuit Court of Madison County, Illinois; and plaintiff is hereby assessed with all costs in this suit up to and including the costs of this change of venue, save and except such costs as shall have been occasioned by the Defendants answer to the Complaint, the trial thereof, and the costs of the appeal herein; the Clerk is hereby instructed to transmit all and singular a transcript of the record and proceedings in this case in this court, together with all orders, papers, pleadings and files, to the Clerk of said Circuit Court of Madison County, Illinois, without delay. The Motion by defendants to dismiss this action is denied.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 7] Cost bill in the City Court of Granite City, Illinois.

Record entry of the filing, on July 31, 1942, in the Circuit Court of Madison County, Illinois, on change of venue from the City Court of Granite City, Illinois, of the various pleadings, papers and exhibits in this cause.

Placita and convening order of the City Court of Granite City, Illinois, December 13, 1937.

COMPLAINT

(Filed in the City Court of Granite City, Illinois, December 22, 1937.)

Victor J. Herb, plaintiff, by McGlynn & McGlynn and Mark D. Eagleton, his attorneys, complaining of Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers for the Wabash Railway Company, a corporation, defendants, alleges:

1. That the defendants were at all times herein mentioned, and are now, the duly appointed, qualified and acting receivers for the Wabash Railway Company, a cor-

poration, under and by virtue of their appointment as such by duly made and entered order or orders of the United [fol. 8] States District Court for the Southern District of Illinois.

2. That at all times herein mentioned defendants, as such receivers, were, and are now, in charge of and operating all of the herein referred to railroad properties, steam railroad system and lines, locomotives, cars, tracks and equipment of the said Wabash Railway Company, operating the same as common carriers of freight and passengers for hire to and from the State of Illinois and to and from other states of the United States of America, and engaged in interstate commerce by railroad.

3. That on the 23rd day of November, 1936, plaintiff was, and for some time prior thereto had been, a servant in the employ of the defendants as a switchman, working as such employee and servant of defendants in, upon and about defendants' cars, trains and locomotives used and hauled by defendants as such common carrier by railroad.

4. That as such switchman, servant and employee of defendants, as aforesaid, plaintiff's earnings and wages were approximately two hundred dollars ($200.00) per month.

5. That on said date aforesaid, at the time of his injury hereinafter alleged, plaintiff was working as such employee, servant and switchman of defendants in, upon and about a train which contained cars then and there being moved and transported by defendants in interstate commerce, and which contained shipments originating in Illinois and destined to points outside of the State of Illinois.

[fol. 9] 6. That by reason of the facts hereinbefore alleged, plaintiff and defendants became, and were at all times herein mentioned, engaged in interstate commerce and transportation, and subject to the provisions of certain acts of Congress of the United States relating to the liability of railroads for injury to and death of their employees, which statutes are commonly known as the Federal Employers' Liability Act (45 U. S. C. A., Sections 51-59).

7. That at the time of the hereinafter mentioned injury to plaintiff, he was working as such switchman for the defendants and as a member of one of defendants' switching

crews in, upon and about a train of cars which was being moved and hauled by one of defendants' locomotives in the yards of the A. E. Staley Manufacturing Company at or near the City of Decatur, County of Macon, State of Illinois.

8. That under and by virtue of the terms and provisions of certain acts of Congress of the United States of America, commonly known as the Federal Safety Appliance Act (45 U. S. C. A., Sections 1-16), and under and by virtue of the terms and provisions of the orders, rules and regulations of the Interstate Commerce Commission of the United States made, entered and promulgated pursuant to said Federal Safety Appliance Act (45 U. S. C. A., Section 12), it became and was the duty of defendants not to haul or use any car not equipped with an efficient hand brake.

9. That defendants disregarded their duty in that behalf and then and there had in use and hauled, upon the tracks in said yard, a boxcar which was not then and there [fol. 10] equipped with an efficient hand brake as prescribed by the aforesaid Federal Safety Appliance Act and the orders, rules and regulations of the Interstate Commerce Commission made pursuant thereto.

10. That, while plaintiff and defendants were thus engaged in interstate commerce and transportation as aforesaid, and while plaintiff, in the usual course of his employment as aforesaid, was upon said boxcar, which was not equipped with an efficient hand brake as aforesaid, and while said car was being used and hauled by defendants as aforesaid, plaintiff did place his hand upon the wheel of said hand brake and said hand brake did improperly release and operate so that the wheel thereof did suddenly, violently and unexpectedly spin and turn, causing plaintiff to be thrown from said boxcar to the ground and tracks there and to be run over by the cars of said train and to sustain the injuries hereinafter more particularly alleged, all of which was caused by the inefficiency of said hand brake and as a direct and proximate result of defendants' aforesaid violation of their duty under said Federal Safety Appliance Act and the orders, rules and regulations of the Interstate Commerce Commission made and promulgated pursuant thereto, as hereinbefore alleged.

11. Plaintiff further states that, as a direct and proximate result of defendants' aforesaid failure to comply with the aforesaid laws of the United States of America, and with the aforesaid rules, orders and regulations of the Interstate Commerce Commission, plaintiff's head, face, neck, [fol. 11] back and spine, chest, abdomen, and internal organs, arms and legs, and the bones, joints, muscles, tendons, tissues, nerves, membranes, ligaments, vessels and skin thereof were seriously bruised, contused, lacerated, sprained, strained, wrenched, swollen, inflamed, infected, scarred, disfigured, dislocated, displaced, fractured and amputated; that plaintiff's left leg was run over, mangled and a part of the leg and foot amputated by the wheels of the said train; that plaintiff was required to undergo operations for the reamputation of said left leg; that plaintiff sustained a severe shock, and his nerves and nervous system were severely shocked; that plaintiff suffered, suffers and will in the future continue to suffer severe pain of body and anguish of mind, and from headaches, nervousness, weakness and insomnia; that plaintiff has been disabled from performing his usual work and duties as a switchman, and will in the future continue to be so disabled; that plaintiff has lost wages and earnings at the rate of approximately two hundred dollars ($200.00) per month, from said 23rd day of November, 1936, to the time of the filing of this complaint, and will in the future continue to lose all or the greater portion thereof; that plaintiff's ability to walk and to move about has been seriously and permanently impaired and diminished; that plaintiff's ability to work and to earn a livelihood has been seriously and permanently impaired, lessened and diminished; that all of said injuries and effects are serious and permanent, and the function and use of all the aforesaid parts and organs have been seriously and permanently impaired, diminished and rendered painful; all to the plaintiff's injury and damage in the sum of sixty thousand dollars ($60,000.00).

[fol. 12] Wherefore, plaintiff demands judgment against defendants for the sum of sixty thousand dollars ($60,000.00).

Mark D. Eagleton, 1020 Telephone Building, St. Louis, Missouri, McGlynn & McGlynn, 120 North Main Street, East St. Louis, Illinois, Attorneys for Plaintiff.

Plaintiff demands a jury trial in this case.

Plaintiff requests the Court to issue summons for the defendants in the above cause.

Mark D. Eagleton, McGlynn & McGlynn, Attorneys for Plaintiff.

Request for summons.

Demand for jury trial.

Summons with Sheriff's return.

Answer of Defendants

(Filed in the City Court of Granite City, Illinois, February 28, 1938.)

Now come Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers for Wabash Railway Company, duly appointed, qualified and acting as such by an order and decree of the District Court of the United States for the Southern District of Illinois, and appearing only as such [fol. 13] Receivers, and for answer as such Receivers to the complaint, say:

1. That these defendants were at all times mentioned in the complaint, and are now, the duly appointed, qualified and acting Receivers for the Wabash Railway Company, a corporation, under and by virtue of an order and decree of the District Court of the United States for the Southern District of Illinois.

2. That, as such Receivers, at the times mentioned in the complaint, they were, and are now, in charge of and operating the railroad properties, locomotives, cars, tracks and equipment of said Wabash Railway Company located within the Southern District of Illinois, as common carriers of freight and passengers for hire between stations and points in said Southern District of Illinois and other states of the United States, and engaged in interstate commerce by railroad; but they deny that, as such Receivers, they were at all times mentioned in the complaint, and now are, in charge of and operating all of the railroad properties, steam railroad system and lines, locomotives, cars, tracks and equipment of said Wabash Railway Company, as alleged in paragraph 2 of said complaint.

3. That on the 23rd day of November, 1936, plaintiff was, and for some time prior thereto had been, a servant

in the employ of the defendants; but they deny that on said day he was employed as a switchman working upon and about defendants' cars, trains and locomotives used and hauled by defendants as such common carrier by railroad.

4. They deny that, as such servant and employee, plaintiff's earnings and wages were approximately two hundred dollars ($200.00) per month.

[fol. 14] 5. They deny that on said last-mentioned date, at the time of plaintiff's alleged injury, he was working as such employee, servant and switchman of defendants in, upon and about a train which contained cars then and there moved and transported by defendants in interstate commerce, and which contained shipments originating in Illinois and destined to points outside of the State of Illinois.

6. They deny that, by reason of the facts alleged in the complaint, plaintiff and defendants became and were at all times therein mentioned engaged in interstate commerce and transportation, and subject to the provisions of certain Acts of Congress of the United States relating to the liability of railroads for injury to and death of their employees, which statutes are commonly known as the Federal Employers' Liability Act (45 U. S. C. A., Sections 51-59).

7. They deny that at the time of plaintiff's alleged injury he was working as such switchman for the defendants and as a member of one of defendants' switching crews in, upon and about a train of cars which plaintiff alleges was being moved and hauled by one of defendants' locomotives in the yards of the A. E. Staley Manufacturing Company at or near the City of Decatur, County of Macon, State of Illinois.

8. They deny that under and by virtue of the terms and provisions of certain acts of Congress of the United States of America, commonly known as the Federal Safety Appliance Act (45 U. S. C. A., Sections 1-16), and under and by virtue of the terms and provisions of the orders, rules and regulations of the Interstate Commerce Commission of the [fol. 15] United States made, entered and promulgated pursuant to said Federal Safety Appliance Act (45 U. S. C. A., Section 12), it became and was the duty of defendants not to haul or use any car not equipped with an efficient hand brake.

9. Defendants deny that they disregarded their alleged duty, and deny that they then and there had in use and hauled upon the tracks in said yards a boxcar which was not then and there equipped with an efficient hand brake, as prescribed by the Federal Safety Appliance Act and the orders, rules and regulations of the Interstate Commerce Commission made pursuant thereto.

10. Defendants deny each and every averment in paragraph 10 of the complaint, and deny that plaintiff and defendants were engaged in interstate commerce and transportation, and deny that while plaintiff was in the usual course of his employment he was upon a boxcar which was not equipped with an efficient hand brake, and deny that while said alleged car was being used and hauled by defendants that plaintiff placed his hand upon the wheel of said hand brake, and deny that said hand brake did improperly release and operate so that the wheel thereof did suddenly, violently and unexpectedly spin and turn, causing the plaintiff to be thrown from said boxcar to the ground and tracks there and to be run over by the cars of said train and to sustain the injuries alleged to have been sustained by him, as set forth in said complaint; and they deny that any alleged injuries received by plaintiff were caused by the inefficiency of said hand brake or as a direct and proximate result of defendants' violation of their duty under said Federal Safety Appliance Act [fol. 16] and the orders, rules and regulations of the Interstate Commerce Commission made and promulgated pursuant thereof.

11. Defendants deny that as a direct and proximate result of defendants' alleged failure to comply with the laws of the United States of America, and with the rules, orders and regulations of the Interstate Commerce Commission, as alleged in the complaint, the plaintiff's head, face, neck, back and spine, chest, abdomen, and internal organs, arms and legs, and the bones, joints, muscles, tendons, tissues, nerves, membranes, ligaments, and other parts of plaintiff's body were seriously bruised, contused, lacerated, sprained, strained, wrenched, swollen, inflamed, infected, scarred, disfigured, dislocated, displaced, fractured, amputated, and otherwise injured; and deny that plaintiff's left leg was run over, mangled, and a part of the leg and foot amputated by the wheels of defendants' train, or

that plaintiff was required to undergo operations for the reamputation of said left leg, or that plaintiff sustained a severe shock; and they deny that plaintiff suffered and will in the future continue to suffer severe pain of body and anguish of mind, and from headaches, nervousness, weakness and insomnia, or that plaintiff has been disabled from performing his usual work and duties as a switchman, and deny that he will in the future continue to be disabled, or that plaintiff has lost wages and earnings at the rate of approximately two hundred dollars ($200.00) per month from the said 23rd day of November, 1936, to the time of the filing of his complaint, or that he will in the future continue to lose all or the greater portion of said amount; and they deny that plaintiff's [fol. 17] ability to work and to earn a livelihood has been seriously and permanently impaired, lessened and diminished, or that his alleged injuries and effects are serious and permanent; and deny that plaintiff has been permanently disabled and impaired, as alleged in said complaint.

12. Defendants, as such Receivers, for further answer to the complaint, and by way of affirmative relief, state that if the said Victor J. Herb received the injuries alleged in the complaint, that such injuries did not result from any violation by defendants of the Federal Safety Appliance Act, or the orders, rules and regulations of the Interstate Commerce Commission of the United States, as alleged in the complaint, but were the direct result of and caused by risks assumed by the said Victor J. Herb in the performance of the work in which he was then engaged and which was then being performed by him; that he was an experienced switchman and employee in railroad work, and that the risk and danger of injury while performing said work were open and obvious to a person of ordinary prudence, and that said Victor J. Herb was acquainted with and aware of such danger and risk, or ought to have been informed and aware of such danger and risk in performing the work in which he was then and there employed; that such risk and danger were incidents to his employment, and that by reason thereof the said Victor J. Herb assumed the risk and danger of such employment, and that he is, therefore, not entitled to recover.

13. Defendants, as such Receivers, for further answer and defense to the complaint, state that if said Victor J.

Herb was thrown from a train or from a boxcar at the time and place alleged in the complaint and was injured, [fol. 18] as alleged therein, that said injuries were directly caused by the carelessness and negligence of the said Victor J. Herb in the manner in which he performed his said duties and the manner in which he moved upon, along and over said train or said boxcar and in failing to anticipate and guard against the movements and motion of the said train and said boxcar, and in failing to so move over, upon and along said train or said boxcar as to avoid becoming unbalanced and falling or being thrown from said train or said boxcar, when, by the exercise of reasonable and ordinary care on his part, he could have avoided falling or being thrown therefrom, and that said negligence and carelessness on the part of said Victor J. Herb directly caused or contributed to his alleged injuries.

14. Defendants deny that plaintiff is entitled to a judgment against them, or either of them, for the sum of sixty thousand dollars ($60,000.00), or any part thereof.

Wherefore, having fully answered the complaint, these defendants, as such Receivers, ask to be discharged with their costs.

Wesley Lueders, Granite City, Illinois; Warnock, Williamson & Burroughs, Bank of Edwardsville Building, Edwardsville, Illinois, Attorneys for Defendants.

Plaintiff's reply filed in the City Court of Granite City, Illinois, March 5, 1938.

[fol. 19] Verdict of the jury, in favor of the plaintiff in the sum of $30,000.00, filed in the City Court of Granite City, Illinois, October 15, 1938.

Plaintiff's notice of appeal, filed in the City Court of Granite City, Illinois, October 25, 1939.

Affidavit of service of plaintiff's notice of appeal.

Praecipe for record, filed in the City Court of Granite City, Illinois, October 28, 1939.

Affidavit of service of praecipe for record.

MANDATE OF APPELLATE COURT—Filed in the City Court of Granite City, Illinois, November 12, 1941

REVERSED ORDER

STATE OF ILLINOIS,
Appellate Court, Fourth District, ss.:

At an Appellate Court, begun and held at Mt. Vernon, on the fourth Tuesday in the month of May, in the year of our Lord one thousand nine hundred and forty-one, the same being the 27th day of May, in the year of our Lord one thousand nine hundred and forty-one.

Present: Hon. Lawrence E. Stone, Presiding Justice, Hon. Ralph J. Dady, Justice, Hon. John T. Culbertson, Jr., Justice, and David F. Mallett, Clerk.

And afterwards, to wit, on the 3rd day of October, in the year of our Lord one thousand nine hundred and forty-one, an order was made by said Court in words and figures following, to wit:

[fol. 20] No. 10. FEBRUARY TERM, 1940.

VICTOR J. HEER, Plaintiff-Appellant,

v.

NORMAN B. PITCAIRN and FRANK C. NICODEMUS, JR., Receivers for the Wabash Railway Co., a Corp., Defendants-Appellees.

Appeal from City Court of Granite City, Madison County.

On this day come again the said parties, and the Court having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, are of the opinion that in the record and proceedings aforesaid, and in the rendition of the judgment aforesaid, there is manifest error in this: The trial court erred as set forth in the opinion of this Court filed herein on the 30th day of October, 1940, and this Court erred as set forth in the opinion filed by the Supreme Court in this Office on October 3, 1941.

Therefore, it is considered by the Court that, for such error, and others, in the proceedings aforesaid, the judg-

ment of the City Court entered non obstante veredicto be reversed, annulled, set aside and wholly for nothing esteemed, and that the motions heretofore made to reverse the judgment entered non obstante veredicto, and remand said cause for further proceedings in accordance with the opinions of this Court and the Supreme Court, be and the same are allowed, and the motions heretofore made to affirm the judgment and for procedendo be denied, and that this cause be remanded to the City Court of Granite [fol. 21] City with directions for further proceedings in accordance with the views expressed in the above-mentioned opinions hereto attached. And it is further considered by the Court that the said appellant recover of and from the said appellees cost by him in this behalf expended, and that appellant have execution therefor.

I, David F. Mallett, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, do hereby certify that the foregoing is a true copy of the final order of said Appellate Court in the above-entitled cause of record in my office.

In testimony whereof, I have set my hand and affixed the seal of the said Court at Mt. Vernon, this 1st day of November in the year of our Lord one thousand nine hundred and forty one.

David F. Mallett, Clerk of the Appellate Court.
(Seal.)

Defendants' motion to dismiss, filed in the City Court of Granite City, Illinois, November 25, 1941.

NOTICE OF FILING OF MANDATE, ETC.—Filed in the City Court of Granite City, Illinois, November 25, 1941

To the Above Named Defendants or Warnock, Williamson & Burroughs, Their Attorneys:

You Are Hereby Notified that on the 12th day of November, 1941, the undersigned filed in the office of the Clerk of the City Court of Granite City the mandate, and transcript of the order, of the Appellate Court, which reversed the judgment entered for the defendants non obstante vere- [fol. 22] dicto by the said City Court of Granite City in the above entitled cause.

You Are Further Notified that on the 25th day of November, 1941, at 2 o'clock p. m., or as soon thereafter as counsel may be heard, the undersigned will appear before the Honorable Wesley Lueders, Judge of said City Court of Granite City, in the room usually occupied by him as a court room or before any other judge who may be sitting in his stead, and shall then and there file and present:

1. A motion that the above entitled cause be redocketed; and

2. A motion for judgment upon the verdict in the above entitled cause, at which time you may appear if you see fit.

Copies of said motions are hereto attached.

Dated this 12th day of November, 1941.

Victor J. Herb, Plaintiff, by Mark D. Eagleton, McGlynn & McGlynn, His Attorneys.

Receipt of a copy of the above and foregoing notice, together with copies of the motions therein referred to thereto attached, is hereby acknowledged this 12th day of November, 1941.

Warnock, Williamson & Burroughs, Attorneys for Defendants.

[fol. 23] Motion to Redocket—Filed in the City Court of Granite City, Illinois, November 25, 1941

Now comes Victor J. Herb, plaintiff in the above entitled cause, by his counsel, and shows to the Court that:

1. On the 12th day of November, 1941, the plaintiff filed in the office of the clerk of this court the mandate, and transcript of the order, of the Appellate Court, which reversed the judgment entered for the defendants non obstante veredicto by this Court in the above entitled cause.

2. On the 12th day of November, 1941, plaintiff gave to the above named defendants, through their counsel, ten days statutory notice required to be given to the adverse party or parties in order to reinstate a case remanded from a court of review.

Wherefore, plaintiff moved the Court to make and enter an order herein redocketing the above-entitled cause, pursuant to the statutes in such cases made and provided.

Mark D. Eagleton, McGlynn & McGlynn, Attorneys for Plaintiff.

ORDER TO REDOCKET—Filed in the City Court of Granite City, Illinois, November 25, 1941

It appearing that the mandate, and a transcript of the order, of the Appellate Court reversing the judgment entered for defendants non obstante veredicto by the City [fol. 24] Court of Granite City, in the above-entitled cause, has been filed in the office of the clerk of this court, and it appearing that ten (10) days statutory notice required to be given to the adverse party or parties in order to reinstate a case remanded from a court of review has been given to defendants, and all of the parties being present in open court by their counsel, on motion of the plaintiff, by his counsel, it is ordered that this cause be, and the same is, hereby redocketed.

Dated this 25 day of November, 1941.

Wm. P. Boynton, Presiding Judge.

PLAINTIFF'S MOTION FOR CHANGE OF VENUE—Filed in the City Court of Granite City, Illinois, June 17, 1942

Comes now Victor J. Herb, plaintiff in the above-entitled cause, by Mark D. Eagleton and McGlynn & McGlynn, his attorneys, and states to and shows the Court that:

1. This suit or action was commenced in this court on or about the 22nd day of December, 1937;

2. As appears from the pleadings heretofore filed in this court in this cause, plaintiff's cause of action against defendants, which is involved in this suit or action, is a transitory cause of action which arose in or near the City of Decatur, State of Illinois.

3. The Supreme Court of Illinois, in the case of Paul W. Werner, Appellee, v. Illinois Central Railroad Company, [fol. 25] Appellant, No. 26,293, in said Supreme Court of

Illinois, decided March 16, 1942, rehearing denied June 9, 1942, and not yet reported, has ruled that each of the various City Courts in the State of Illinois is without jurisdiction to hear and determine any suit or action involving a cause of action which arose outside the city where said court is located; and

4. By reason of the premises, this suit or action has been commenced, and is pending, in the wrong court, and the venue thereof should be changed to a proper court pursuant to the terms and provisions of Chap. 146, Par. 36, Illinois Revised Statutes 1941.

Plaintiff further states that he is ready, willing and able, and hereby offers, to pay any and all costs required of him by the terms and provisions of said Chap. 146, Par. 36, Illinois Revised Statutes 1941.

Wherefore, plaintiff moves this Court, pursuant to the terms and provisions of said Chap. 146, Par. 36, Illinois Revised Statutes 1941, to change the venue of this suit or action to a proper court, to wit, the Circuit Court of Madison County, State of Illinois.

Mark D. Eagleton, McGlynn & McGlynn, Attorneys for Plaintiff Victor J. Herb.

Receipt of a copy of the above and foregoing motion is hereby acknowledged this 17th day of June, 1942.

Warnock, Williamson & Burroughs, Attorneys for Defendants.

[fol. 26] Defendants' Motion to Dismiss—Filed in the Circuit Court of Madison County, Illinois, August 21, 1942

Now come Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers for the Wabash Railway Company, a corporation, defendants in the above-entitled cause, by Warnock, Williamson & Burroughs, their attorneys, and, limiting their appearance herein for the sole and only purpose of this motion, move the Court to dismiss this cause and in support of this motion show to the Court the following, to wit:

1. That, as appears from the transcript of the record and proceedings and the files in this cause, plaintiff's complaint

and alleged cause of action was filed and instituted in the City Court of the City of Granite City in Madison County, Illinois, on, to wit, the 22nd day of December, A. D. 1937, in which said court the said cause remained, except such time as the same was pending on appeal in the Appellate and Supreme Courts of Illinois, and various and sundry proceedings were had therein, until on, to wit, the 17th day of July, A. D. 1942, when, on motion of plaintiff, the City Court of Granite City attempted to change the venue of this cause to this court, by entering an order of that date directing the Clerk of said City Court to transmit a transcript of the record and proceedings in said City Court in said cause, together with all orders, pleadings and files to the clerk of this court; and that pursuant to such order of said City Court a transcript of the record and proceedings of said City Court, in said cause, and all the files therein, were on, to wit, the —day of July, A. D. 1942, filed in the office of the clerk of this court.

[fol. 27] 2. That it appears from the plaintiff's complaint so filed in said City Court of Granite City, Illinois, that plaintiff's alleged cause of action is a civil action at law brought under the Federal Employers' Liability Act to recover damages for personal injuries suffered and sustained by the plaintiff on, to wit, November 23, 1936, while an employee of the defendants; and it further appears from said complaint that plaintiff's injuries were suffered and sustained, and that all transactions involved in this cause and out of which said alleged cause of action arises occurred at Decatur in Macon County, Illinois, and not within the territorial limits of the City of Granite City, in Madison County, Illinois.

3. That under and by virtue of Section 1 of Article VI of the Constitution of 1870 of the State of Illinois, the General Assembly of the State of Illinois is limited, so far as the creation of courts for cities is concerned, to courts in and for such cities, having jurisdiction only of the subject matter of causes of action arising within the territorial limits of such cities; that the City Court of Granite City, Illinois, was established and now exists under the provisions of said Section 1 of Article VI of the Constitution of 1870 of the State of Illinois and the Statutes of the State of Illinois enacted pursuant thereto, to wit, an act entitled "An Act in

Relation to Courts of Record in Cities," approved March 26, 1874, and in force July 1, 1874 (Ill. Rev. Stat., 1874, Ch. 37, Pars. 191 to 212 inclusive), and amendments thereto; that by reason of said constitutional provisions and the terms and provisions of the Statute of the State of Illinois under and by virtue of which the said City Court of Granite City was [fol. 28] established and now exists, the jurisdiction of said City Court is limited to the territorial limits of said City of Granite City in all civil cases, both law and chancery, arising within the corporate limits of said city, and that said City Court has no jurisdiction whatsoever under said statute and the Constitution of the State of Illinois to hear and determine causes of action arising outside of the territorial limits of said city.

4. That said City Court of Granite City, Illinois, was at all times heretofore without jurisdiction to try and determine or to adjudicate said suit or alleged cause of action or to enter any order therein; that said suit or alleged cause of action was improperly filed and instituted in said City Court, and that all orders heretofore entered in said cause and all proceedings had therein by the said City Court, of Granite City, Illinois, are null and void and of no effect.

5. The said City Court of Granite City, Illinois, being without jurisdiction to try this cause or to enter any valid order therein, the said order of said City Court entered on July 17, 1942, attempting to change the venue of this cause and ordering the same to be transferred from said City Court to the Circuit Court of Madison County, Illinois, is invalid and of no force and effect and was improperly entered, and that this cause is improperly upon the docket of this court.

6. The Venue Act (Par. 36, Ch. 146, Ill. Rev. Stat. 1941), if it purports, as is claimed, to authorize a City Court to change the venue or to transfer a cause of action in which it has no jurisdiction of the subject matter to another court having jurisdiction, is at variance with and contrary to [fol. 29] Section 1, Article VI, of the Constitution of the State of Illinois and to the statutes under which City Courts are established, and is therefore null and void.

7. The Venue Act (Ch. 146, Par. 36, Ill. Rev. Stat. 1941), if it purports, as is claimed, to authorize the City Court of Granite City to transfer to another court a cause of action

arising under the Federal Employers' Liability Act, but not within the corporate limits of the City of Granite City, is at variance with Section 6 of said Federal Act (Sec. 56, Tit. 45, U. S. Code, Annot.), since that act refers only to actions brought "in any state court of competent jurisdiction," and any such attempt to change the venue is, therefore, null and void.

8. Plaintiff's injuries were sustained on the 23rd day of November, A. D. 1936, and his cause of action, if any, accrued on that date. Plaintiff did not commence this suit in a court having jurisdiction of the subject matter or any court of competent jurisdiction within two (2) years from the date he sustained and received his injuries.

9. Plaintiff, by filing his complaint in the City Court of Granite City, did not "commence" his action within the meaning of Section 6 of the Federal Employers' Liability Act (Sec. 56, Tit. 45, U. S. C. A., 1941, Ann., Pocket Part).

10. The order of said City Court attempting to change the venue of this cause to this court was improper, and the transcript of the record and proceedings of said City Court in said cause, with the files therein, were improperly transferred to and filed in the office of the clerk of this court; [fol. 30] and this Court is without jurisdiction to hear and determine this cause, or to enter any order therein except an order of dismissal as prayed herein.

Wherefore, defendants pray that this cause be dismissed.

Warnock, Williamson & Burroughs, Bank of Edwardsville Building, Edwardsville, Illinois, Attorneys for Defendants.

Adjourning order of the Circuit Court of Madison County, Illinois, October 16, 1942.

Convening order of the Circuit Court of Madison County, Illinois, October 19, 1942.

IN THE CIRCUIT COURT OF MADISON COUNTY, ILLINOIS

4290 Law

VICTOR J. HERB

vs.

NORMAN B. PITCAIRN and FRANK C. NICODEMUS, JR., Receivers for Wabash Railway Company, a Corporation

ORDER SUSTAINING DEFENDANTS' MOTION TO DISMISS, AND ENTERING JUDGMENT OF DISMISSAL—Entered November 27, 1942

And now on this day motion to dismiss sustained. Therefore it is considered and adjudged by the Court that the [fol. 31] plaintiff take nothing by his suit, and that the defendant go hence without day, and that the defendants have and recover of and from plaintiff their costs and charges in this behalf expended and have execution therefor.

Adjournment order of the Circuit Court of Madison County, Illinois, January 8, 1943.

Convening order of the Circuit Court of Madison County, Illinois, January 11, 1943.

CERTIFICATE OF TRIAL JUDGE—Filed in the Circuit Court of Madison County, Illinois, February 23, 1943

I, Dick H. Mudge, Judge of the Circuit Court of Madison County, State of Illinois, before whom and by whom the above entitled cause was heard and final order and judgment of dismissal therein entered at the request of counsel for plaintiff, do hereby certify that there is involved in said case, and in said final order and judgment, a construction of the Constitution of the State of Illinois and of the United States and the validity of a statute, to wit, Section 36 of Chapter 146, Revised Statutes of Illinois 1941, also the validity, construction and application of a federal statute, to wit, Section 6 of the Federal Employers' Liability Act, as amended (Section 56, Title 45, U. S. C. A., 1941, Ann., Pocket Part).

I further certify that, in my opinion, the public interest requires that the appeal herein shall be taken directly to the Supreme Court of Illinois.

Dated this 12th day of February, 1943.

D. H. Mudge, Judge of the Circuit Court of Madison County, Illinois.

[fol. 32] NOTICE OF APPEAL

Plaintiff-appellant's notice of appeal to the Supreme Court of Illinois from the Circuit Court of Madison County, Illinois, filed February 23, 1943, appealing from the whole of the order and final judgment entered in this cause on the 27th day of November, 1942, sustaining defendants-appellees' motion to dismiss and dismissing plaintiff-appellant's action and cause at his cost, and asking by way of relief that said order and judgment be reversed and the cause remanded to said Circuit Court of Madison County, Illinois, with directions to reinstate plaintiff-appellant's cause upon the docket of said Circuit Court for further proceedings therein, to set aside and vacate said order, ruling and judgment sustaining defendants-appellees' motion to dismiss and dismissing plaintiff-appellant's cause, and to overrule defendants-appellees' motion to dismiss, with the certificate of the clerk as to the filing of said notice of appeal, together with proof of service of a copy of said notice of appeal on opposite counsel on February 23, 1943.

Praecipe for record, with proof of service of copy thereof on opposing counsel, filed February 23, 1943.

Adjournment order of the Circuit Court of Madison County, Illinois, March 12, 1943.

Convening order of the Circuit Court of Madison County, Illinois, March 15, 1943.

Certificate of the Clerk of the Circuit Court of Madison County, Illinois, to the transcript of record, dated March 23, 1943.

[fol. 33] The above and foregoing is respectfully submitted as and for plaintiff-appellant's abstract of record herein.

McGlynn & McGlynn, 120 North Main Street, East St. Louis, Illinois; Mark D. Eagleton, 3746 Grandel Square, St. Louis, Missouri; Roberts P. Elam, 706 Chestnut Street, St. Louis, Missouri, Attorneys for Plaintiff-Appellant.

[fol. 3] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court ss:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the tenth day of May in the year of our Lord, one thousand nine hundred and forty-three, within and for the State of Illinois.

Present: Clyde E. Stone, Chief Justice, Justice Francis S. Wilson, Justice Loren E. Murphy, Justice William J. Fulton, Justice Walter T. Gunn, Justice June C. Smith, Justice Charles H. Thompson; George F. Barrett, Attorney General; Warren C. Murray, Marshal. Attest: Edward F. Cullinane, Clerk pro tempore.

Be it remembered, that, to-wit: on the 20th day of May, A. D. 1943, the same being one of the days of the term of Court aforesaid, an order of submission was entered by the Supreme Court of Illinois in the same case, which order of submission is in the words and figures following, to-wit:

[fol. 4] No. 27275

VICTOR J. HERR, Appellant

vs.

NORMAN B. PITCAIRN AND FRANK C. NICODEMUS, JR., Receiver for Wabash Railway Company, a corporation, Appellees.

Appeal, Circuit Court, Madison County

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this Court, and it appearing to the Court that appellant hath filed herein a duly certified transcript of the record and proceedings of the Court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellees having entered motion to affirm said judgment and for costs and proceedendo, and said motions being taken under advisement for final hearing, and the Clerk of this Court reporting that said cause is now ready to be taken, and said cause having been

argued orally by Roberts P. Elam for appellant and George D. Burroughs for appellees is here submitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

[fol. 5] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the thirteenth day of September in the year of our Lord, one thousand nine hundred and forty-three, within and for the State of Illinois.

Present: June C. Smith, Chief Justice; Justice Clyde E. Stone, Justice Walter T. Gunn, Justice William J. Fulton, Justice Francis S. Wilson, Justice Loren E. Murphy, Justice Charles H. Thompson; George F. Barrett, Attorney General; Warrent C. Murray, Marshal.

Attest: Edward F. Cullinane, Clerk pro tempore.

Be it remembered, that, to wit: on the 24th day of September, A. D. 1943, the same being one of the days of the term of Court aforesaid, an opinion was filed by the Supreme Court of Illinois in the office of the clerk of the Supreme Court of Illinois, in the same case, which opinion is in the words and figures following, to-wit:

[fol. 6] Docket No. 27275—Agenda 40—May, 1943

VICTOR J. HERB, Appellant,

v.

NORMAN B. PITCAIRN et al., Receivers for WABASH RAILWAY COMPANY, Appellees.

MR. JUSTICE GUNN delivered the opinion of the court:

The appeal in this case is taken by the plaintiff, Victor J. Herb, from the judgment of the circuit court of Madison county sustaining the defendants' motion to dismiss, and entering final judgment of dismissal in favor of defendants-appellees. Among the grounds urged before the circuit court as a basis for such dismissal was the unconstitution

ality of a statute, as shown by the certificate of the trial judge, which would give us jurisdiction of the direct appeal, whether or not the case was decided upon that point. *Broome* v. *Frogge Engineering Co.* 374 Ill. 113.

The facts in the case are substantially as follows: The plaintiff was an employee of the receivers of the Wabash Railway Company, and December 22, 1937, commenced an action in the city court of Granite City, Illinois, against the defendants stating a cause of action under the Federal Employers' Liability Act for injuries claimed to have been sustained in the city of Decatur, Illinois, November 23, 1936. The defendants answered denying the allegations of the complaint and setting up other defenses. The cause was tried in the city court in October, 1938, and resulted in a verdict in favor of the plaintiff, which was set aside upon a motion by the defendants for judgment notwithstanding the verdict.

The plaintiff appealed to the Appellate Court, where the cause was reversed and remanded, which action was affirmed by this court in *Herb* v. *Pitcairn*, 377 Ill. 405. After the cause had been redocketed, but before it was tried, the cases of *Werner* v. *Illinois Central Railroad Co.* 379 Ill. 559, and *Mitchell* v. *Louisville and Nashville Railroad Co.* 379 Ill. 522, were decided by this court, in which it was held and determined the city courts in Illinois were without jurisdiction to hear and determine the subject matter of any action, the cause of which arose outside of the territorial limits of the city court in which the action was pending. After learning of these decisions the plaintiff filed a motion in the city court of Granite City for a change of venue to the circuit court of Madison county, under the provisions of the statute purporting to authorize a change of venue of a suit commenced in the wrong court or county to the proper [fol. 7] court or county, as in cases of change of venue. (Ill. Rev. Stat. 1941, chap. 146, par. 36.) The motion for change of venue was allowed by the city court and the venue ordered changed to the circuit court of Madison county, and on July 31, 1942, all of the pleadings and papers, and a certified transcript of all orders in said cause in the city court of Granite City were duly filed in the circuit court of Madison county, as on change of venue.

August 21, 1942, appellees filed in the circuit court of Madison county their motion to dismiss plaintiff's cause

for the following reasons: That since the city court of Granite City had no jurisdiction of the case because it appeared the cause of action accrued outside of the territorial limits of Granite City (1) all orders entered, and all proceedings had in the city court of Granite City, including the order changing the venue thereof, were void and of no effect; (2) that the statute authorizing a city court to change the venue of an action of which it has no jurisdiction to a court having jurisdiction is contrary to section 1 of article VI of the constitution, and therefore void; and (3) said cause having been transferred on change of venue on July 17, 1942, more than two years after the date of the injury, November 23, 1936, the plaintiff could not maintain his action because it had not been commenced within two years from the date of his injury in a court having jurisdiction to hear and determine the same.

The circuit court of Madison county sustained the motion of appellees to dismiss plaintiff's suit, and November 27, 1942, entered judgment that the plaintiff take nothing, and that the defendants recover costs. After the entry of judgment the judge of the circuit court signed a certificate that there was involved in the said final order and judgment the construction of the constitutions of the State of Illinois and of the United States, and the validity of a statute, (Ill. Rev. Stat. 1941, chap. 146, par. 36,) and also the validity, construction and application of a Federal statute, viz., section 6 of the Federal Employers' Liability Act as amended. Section 56, Title 45, U. S. C. A. 1941.

The material point for consideration is whether the plaintiff has commenced an action within two years of the date of his injury in a court having jurisdiction to hear and determine the same, as required by section 6 of the Federal Employers' Liability Act, by transferring the cause from a court having no jurisdiction over it at a date which, if then [fol. 8] originally filed in the latter court, could not be maintained because not filed within the statutory time. The question involved relates to the effect of the proceedings had in a court wholly incompetent to render a valid judgment, because if the judgment to be rendered would be void it necessarily follows the preliminary proceedings of the court, necessary to rendition of judgment, must likewise be void. If the court has no jurisdiction of the subject matter for judgment there can be no jurisdiction giving effect to process or pleadings. If judgment had been entered in

the city court it would have been absolutely void. (*Werner v. Illinois Central Railroad Co.* 379 Ill. 559; *Mitchell v. Louisville and Nashville Railroad Co.* 379 Ill. 522.) The act of a tribunal beyond its jurisdiction is null and void whether without its territorial jurisdiction or beyond its powers. (*Welton v. Hamilton*, 344 Ill. 82.) A judgment void upon its face and requiring only an inspection of the record to demonstrate its invalidity is a mere nullity, in legal effect no judgment at all, conferring no right and affording no justification. (*Voorhees v. Bank of the United States*, 10 Pet. 475, 9 L. ed. 501.) Nothing can be acquired or lost by it; it neither bestows nor extinguishes any right. (*Johnson v. Carroll*, 190 Ky. 689, 228 S. W. 412; *Abernathy v. Missouri Pacific Railway Co.* 287 Mo. 30, 228 S. W. 486.) It can be attacked at any time, even in the first instant on appeal. (*Campbell v. Porter*, 162 U. S. 478, 40 L. ed. 1044; *Perez v. Fernandez*, 202 U. S. 80, 50 L. ed. 942.) And it may not be validated either by waiver or consent. (*Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914.) Where there is a want of authority over the subject matter the judgment is open to successful impeachment, if such fact is made to appear from the face of the record or by matters *dehors*, where extraneous evidence is receivable for the purpose. *Armstrong v. Obucina*, 300 Ill. 140; *Rabbitt v. Weber & Co.* 297 Ill. 491.

It is the element of jurisdiction that differentiates a void from a voidable judgment; both the subject matter and the parties must be before the court, and jurisdiction of the one without the other will not suffice; the two must concur or the judgment will be void in any case in which the court assumes to act. (*Rabbitt v. Weber & Co.* 297 Ill. 491.) And we have further held that even a court of general jurisdiction has no power to do any act or render any judgment affecting persons or property, unless the [fol. 9] particular act or judgment is brought within its jurisdiction according to law. (*People ex rel. Brundage v. Rathcamp*, 298 Ill. 611.) These are general principles upon which substantially all courts are in agreement.

Applying now these principles to the facts before us we observe recovery under the Federal Employers' Liability Act is conditioned upon two things: (1) commencing an action within two years from the date of the injury; and (2) commencing such action in a court having jurisdiction to hear and determine the same. It has been held by the Fed-

eral authorities that section 6 of the Federal Employers' Liability Act is not a statute of limitations pertaining to the remedy, but is a condition of liability constituting a substantial part of the right created. (*Central Vermont Railway Co.* v. *White*, 238 U. S. 507, 59 L. ed. 1433; *Phillips* v. *Grand Trunk Railway Co.* 236 U. S. 662, 59 L. ed 774; *Bell* v. *Wabash Railway Co.* 58 Fed. (2) 569; *Atlantic Coast Line Railway Co.* v. *Burnette*, 239 U. S. 199, 60 L. ed. 226.) The plaintiff having predicated his case upon the Federal Employers' Liability Act must comply with its provisions, both with respect to the time of commencing the suit and of bringing it in a court having jurisdiction to hear and determine it.

While the appellant does not precisely so state, apparently it is his contention that, having begun the suit in a court without jurisdiction of the subject matter but having changed the venue thereof and transferred it to one that would have jurisdiction, the date of the transfer to the latter court would relate back to the time of filing it in the court not having jurisdiction, thus giving the order changing the venue the effect of having a case continuously pending in the court of proper jurisdiction from the time the action was commenced in the one not having it. The fallacy of this argument rests in the fact that it becomes necessary to give validity to proceedings in a court, the judgment of which, if rendered upon such proceedings, would be wholly void. If the ultimate object to be obtained in a suit at law, viz., a judgment, is utterly void, it is difficult to understand how any of the preliminaries to such a judgment, such as summons, pleadings, interlocutory orders and the like have any effect, when the result, had such proceeding been concluded in the first court, would have been a nullity.

A case in point is illustrated by the facts in *Crowley* v. *Southern Railway Co.* 139 Fed. 851. The Alabama legislature had attempted to create a circuit court with different [fol. 10] divisions, but the act creating it was held unconstitutional in *Ex parte Birmingham and Atlanta Railway Co.* 42 So. 118. In the *Crowley* case the cause of action was claimed to be saved because a summons had been issued out of such illegal division of the circuit court, but in commenting upon the effect of this summons the court said: "The act constituting the southern division of the circuit court of St. Clair county at Pell City being unconstitutional, there was no authority for filing the summons and com-

plaint with Smith or anybody else at Pell City. The issue of the summons to appear before a court or at a time not authorized by law was a nullity, and so was the service of the summons. What was done in this matter at Pell City was as ineffectual to constitute a 'suit' in the real circuit court of St. Clair county as if the plaintiff had filed the summons and complaint with some merchant at Pell City and procured him to hand them to the defendants." In substance the same has been held in *Inter-Southern Life Insurance Co.* v. *Pierce*, 31 S. W. (2) 692; *Willing* v. *Provident Trust Co.* 21 Fed Supp. 237; *Manning* v. *Ketchem*, 58 Fed. (2) 948, and stated in the text of Cor. Jur. Sec. Vol. 21, pages 177 and 178. And in *Vincent* v. *McElvain*, 304 Ill. 160, at 163, it is said a suit or action is commenced when the party puts in motion, under his claim, the instruments of a court of general jurisdiction.

When the present suit was filed in the city court of Granite City the defendants could have disregarded the summons, and judgment rendered in such court would have been without effect and no justification for seizing defendants' property on execution. Yet, if appellant's contention is sustained, a valid judgment could be obtained by transferring the cause to the proper court upon a summons or notice that defendants could safely disregard when served upon them. This would give the order of transfer by the city court the effect of vitalizing process that was void and considering a case commenced and pending in a proper court during a period when, in legal contemplation, no judicial control of defendants had yet been exercised.

Conceding, but not deciding, that in proper cases a court without jurisdiction of the subject matter could by statute be authorized to transfer its proceedings to a court having jurisdiction, still the condition that the action be commenced within two years is not met. A like situation has been [fol. 11] presented under statutes extending time for bringing suit where an action has been commenced but the plaintiff nonsuited, as illustrated by section 24 of the Limitations Act. (Ill. Rev. Stat. 1941, chap. 83, par. 24a.) Under the conditions present in this case it has been held such statutes cannot recreate a right given under a Federal statute that has ceased to exist by the terms of the (Federal) statute. (*Bell* v. *Wabash Railway Co.* 58 Fed. (2) 571; *Deming & Co.* v. *Southern Pacific Co.* 263 Ill. App. 196; *Sweet* v. *Chattanooga Elec. Lt. Co.* (Tenn.) 36 S. W. 1090; *Galt, O. & F. S.*

Railway Co. v. *Gordon*, 218 S. W. (Texas) 74; *Fidelity Trust Co.* v. *Gill Car Co.* 25 Fed. 737.) In the last case the language used covers precisely the present situation when it is said: "Not only must there be a controversy, but as well always a form of procedure of some kind, possessing all the necessary elements of a 'suit' or 'case' in court, the most important of which is, no doubt, that there shall be a tribunal authorized to issue that indispensable notice which we call a writ of process, to bring the parties together in court; and this must be not only sufficient in form and in fact, but in legal and technical effect, to constitute a 'suit' or 'case' which can only be when the tribunal undertaking the initiatory steps is duly authorized to do that thing and to proceed with the matter of adjudging between the parties. * * * There must be *ex necessitate rei*, a court having power to set in motion the machinery of the law, and this we call its jurisdiction over the subject matter."

Appellant calls our attention to *Central Illinois Public Service Co.* v. *Industrial Com.* 293 Ill. 62, as supporting his claim that the want of jurisdiction of the Granite City city court did not prevent its properly being in the circuit court of Madison county for all purposes. In that case we held the venue statute in Illinois, as applying to a circuit court having no jurisdiction over the subject matter, has no other purpose than to authorize a transfer to another circuit court which had, but does not affect any of the other rights of the parties. This case was so interpreted in *Gill* v. *Lynch*, 367 Ill. 263. In the case last cited a receiver had been appointed in the county court under the so-called Skarda Act. (Laws of 1933, p. 874.) The act was later held unconstitutional. A petition was then filed to transfer the venue of the cause to the circuit court. The question arose as to the effect of the appointment of the receiver in the county court after the case had been transferred to the circuit court. The question [fol. 12] presented for decision was set out as follows: "The question in the case is whether or not the appointment of a receiver for real estate by a county court having no jurisdiction of the subject matter, is validated by a subsequent transfer of the cause to the proper court, under the provisions of the statutes relating to venue." The circuit court held the plaintiff, county treasurer, could not recover anything held by his predecessor in office as re-

ceiver under appointment by the county court because the proceeding was absolutely void. In affirming that decision we held that the appointment of a receiver in the county court and all subsequent orders, except the one transferring the cause, were void. And among other things we said: "The effect of proceedings in courts having jurisdiction of the subject matter is not material here. Principles applicable to such cases have no bearing where the court has no jurisdiction to entertain the cause. It is a cardinal principle of the law that void proceedings are without any force or effect, and are always subject to attack, either directly or collaterally. Neither section 16, nor the act of 1891, contains any provision that, by the most liberal interpretation, can be construed as validating void judgments or proceedings." The distinction to be drawn is that if a case is improperly filed in a court having jurisdiction of the cause generally but without its territorial jurisdiction, it may be transferred to the proper circuit court. But, if the cause is filed in a court which could never lawfully acquire jurisdiction, the transfer to a court which would have had jurisdiction gives no validity to the proceedings in the first court. We think the interpretation of the venue statute in the *Gill* case conclusively is against appellant.

It is clear a suit was not commenced by filing the present suit in the city court of Granite City, or by issuing summons or filing a complaint. Lacking requisite jurisdiction because of the provisions of the constitution limiting it to cases arising within the limits of the city, such court was wholly incompetent to render any judgment or to authorize any proceedings which would result in a judgment. When the case was transferred to the circuit court of Madison county, some five years after the date of the accident, by the filing of the transcript of orders entered in the city court, and the pleadings and other documents, there was no commencement of a suit, but only the receipt of papers from a court in which it was im- [fol. 133] possible to commence one because of its lack of jurisdiction. To hold the suit was started in the circuit court at the time when it was attempted to be commenced in the city court is not only to decide something which is obviously not the fact, but also to give effect to the proceedings in another court, which up to that time must be considered as a nullity. To so hold would in effect revive a

cause of action already barred by limitations and deprive the defendant of a vested right. Cooley's Constitutional Limitations, p. 448.

In this case jurisdiction of the suit was wholly lacking until July 31, 1942 (if we consider the change-of-venue act valid), and at this time the condition imposed upon the plaintiff with respect to bringing his suit had expired by lapse of time. This determination makes it unnecessary to pass upon either the constitutional question involved or the validity of the change-of-venue statute.

It is our conclusion the judgment of the circuit court of Madison county in dismissing the suit and entering judgment against the appellant was correct, and its judgment is accordingly affirmed.

Judgment affirmed.

[fol. 14] UNITED STATES OF AMERICA

STATE OF ILLINOIS
Supreme Court, ss:

At a Supreme Court, began and held in Springfield, on Monday, the 13th day of September in the year of our Lord, one thousand nine hundred and forty-three, within and for the State of Illinois.

Present: June C. Smith, Chief Justice, Justice Clyde E. Stone, Justice Walter T. Gunn, Justice William J. Fulton, Justice Francis S. Wilson, Justice Loren E. Murphy, Justice Charles H. Thompson, George F. Barrett, Attorney General; Warren C. Murray, Marshal. Attest: Edward F. Cullinane, Clerk pro tempore.

Be It Remembered, that, to wit: on the 24th day of September A. D. 1943 the same being one of the days of the said term of said Supreme Court, certain proceedings were had in said court and entered of record in the words and figures following, to wit:

No. 27275

VICTOR J. HERB, Appellant,

vs.

NORMAN B. PITCAIRN AND FRANK C. NICODEMUS, Jr., Receiver for Wasbash Railway Company, a Corporation, Appellees

Appeal from Circuit Court, Madison County. 4290

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

Therefore, it is considered by the Court that the judgment of the circuit court of Madison county aforesaid, Be Affirmed in All Things and Stand in Full Force and Effect, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said appellees recover of and from the said appellant Costs by them in this behalf expended, to be taxed, and that they have execution therefor.

I, Edward F. Cullinane, Clerk pro tempore of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 24th day of September A. D. 1943.

Edward F. Cullinane, Clerk pro tempore, Supreme Court of the State of Illinois. (Seal.)

[fol. 154] And afterwards, to-wit: on the 19th day of October, A. D. 1943, the same being one of the days in vacation after the term of Court aforesaid, there was filed by appellant in the office of the Clerk of the Supreme Court of Illinois in the same case, a petition for rehearing, which petition is in the words and figures following, to-wit:

[fols. 45-47] IN THE SUPREME COURT OF ILLINOIS

[Title omitted]

APPELLANT'S PETITION FOR REHEARING. Filed October 19, 1943

Comes now Victor J. Herb, by McGlynn & McGlynn, Mark D. Eagleton and Roberts P. Elam, his attorneys, and presents his petition for a rehearing of the above entitled cause, and respectfully prays that a rehearing be granted in said cause on the grounds and for the reasons in the petition herewith presented.

McGlynn & McGlynn, Mark D. Eagleton, Roberts P. Elam, Attorneys for Appellant, Victor J. Herb.

[fol. 48] MAY IT PLEASE THE COURT:

I

This Honorable Court, in rendering its opinion and decision in this case, has overlooked, misconceived or misapprehended the point that, notwithstanding that the City Court of Granite City was without jurisdiction to hear and determine the merits of plaintiff-appellant's action against defendants-appellees, plaintiff's said action was "commenced" in that City Court within the two-year period prescribed by Section 6 of the Federal Employers' Liability Act (45 U. S. C. A. [1934 Edition], § 56), and that the City Court had a limited jurisdiction over that action, by virtue of the Illinois Revised Statutes 1941, chap. 146, par. 36, which authorized and empowered the City Court to change the venue of such action to the Circuit Court of Madison County which had jurisdiction to hear and determine the merits of plaintiff's case.

On page 1 of the printed opinion in this case, this Honorable Court fully recognized plaintiff's action against defendants was "commenced within two years from the day the cause of action accrued," as required by Section 6 of the Federal Employers' Liability Act, for this Court there said:

> "The facts in the case are substantially as follows: The plaintiff was an employee of the receivers of the Wabash Railway Company, and December 22, 1937,

> **commenced an action** in the city court of Granite City, Illinois, against the defendants stating a cause of action under the Federal Employers' Liability Act for injuries claimed to have been sustained in the city of Decatur, Illinois, November 23, 1936." (Emphasis ours.)

[fol. 49] However, this Court overlooked, misconceived or misapprehended the requirements of that section of the Federal Act, for on pages 2 and 3 of the printed opinion of this case it said:

> "The material point for consideration is whether the plaintiff has commenced an action within two years of the date of his injury **in a court having jurisdiction to hear and determine the same, as required by section 6 of the Federal Employers' Liability Act**, by transferring the cause from a court having no jurisdiction over it at a date which, if then originally filed in the latter court, could not be maintained because not filed within the statutory time." (Emphasis ours).

and again, on page 4 of the printed opinion it further said:

> "Applying now these principles to the facts before us we observe recovery under the Federal Employers' Liability Act is conditioned upon two things: (1) commencing an action within two years from the date of the injury; and (2) **commencing such action in a court having jurisdiction to hear and determine the same.** * * * The plaintiff having predicated his case upon the Federal Employers' Liability Act must comply with its provisions, both with respect to the time of commencing the suit **and of bringing it in a court having jurisdiction to hear and determine it.**" (Emphasis ours.)

We respectfully submit that Section 6 of the Federal Employers' Liability Act does not necessarily require that actions thereunder must be "commenced" in a court having jurisdiction to hear and determine the merits of the action. [fol. 50] We recognize that a suit is not "commenced" until a proceeding is instituted in a court which has acquired jurisdiction of something in relation to the controversy.

We submit that, in the instant case, the City Court of Granite City had acquired jurisdiction over the person of plaintiff when he applied for its power and assistance in connection with his rights under the law, and that it then had—by virtue of Illinois Revised Statutes 1941, chap. 146, par. 36—a limited jurisdiction to transfer plaintiff's action, by change of venue, to a "proper court" having jurisdiction to hear and determine the merits of that action. This transfer by change of venue, as pointed out at page 24 of appellant's original brief herein and again at page 6 of appellant's reply brief herein, did not constitute the dismissal of plaintiff's suit in the City Court and the commencement of a new suit in the Circuit Court, but constituted merely one of the steps or proceedings in the prosecution of the suit commenced in the City Court and ultimately to be determined on its merits in and by the Circuit Court. It thus appears that when plaintiff commenced his action in the City Court of Granite City, within two years from the date his cause of action accrued, he fully complied with the requirements of Section 6 of the Federal Employers' Liability Act, which, in so far as is here material, provided:

> "No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued. * * * The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States. * * *."

[fol. 51]

II

This Honorable Court, in rendering its opinion and decision in this case, has overlooked, misconceived or misapprehended the opinion and decision of this Court in Central Illinois Public Service Co. v. Industrial Commission, 293 Ill. 62, 127 N. E. 80, and the effect of that decision upon the case at bar.

(A)

On page 6 of the printed opinion, with reference to that decision, this Court has said:

> "In that case we held the venue statute in Illinois, as applying to a circuit court having no jurisdiction over the subject matter, has no other purpose than to authorize a transfer to another circuit court which had,

but does not affect any of the other rights of the parties."

and on page 7 of the printed opinion, this Court in that connection further said:

> "The distinction to be drawn is that if a case is improperly filed in a court having jurisdiction of the cause generally but without its territorial jurisdiction, it may be transferred to the proper circuit court. But, **if the cause is filed in a court which could never lawfully acquire jurisdiction**, the transfer to a court which would have had jurisdiction gives no validity to the proceedings in the first court." (Emphasis ours.)

In making this last statement, we respectfully submit, this Honorable Court has overlooked that, under the facts in the Central Illinois Public Service Co. case, supra, the Circuit Court of Coles County "could never lawfully ac- [fol. 52] quire jurisdiction" to hear and determine the merits of, or over the person of the administrator party in, the suit there commenced in that court. This Court, nevertheless, there ruled that the Circuit Court of Coles County, by virtue of what is now Illinois Revised Statutes 1941, chap. 146, par. 36, was vested with a limited jurisdiction which empowered that Court to change the venue of that suit to the Circuit Court of Champaign County, which was a "proper court" having jurisdiction of the subject matter of the suit and the means of acquiring jurisdiction over the person of the administrator involved therein. This Court, with reference to the effect of the act which is now Illinois Revised Statutes 1941, chap. 146, par. 36, there specifically ruled that (293 Ill., l. c. 69):

> "By this act it is evident that **the legislature intended to and did confer on all courts of record in this State, without regard to any other jurisdiction either conferred upon or denied it by common law or statute, jurisdiction to 'change the venue of such suit or proceeding to the proper court or county.'** It cannot be doubted that the power to confer that **limited jurisdiction** lies within the powers of the legislature, and * * * while the circuit court of Coles County had no jurisdiction of the subject matter involved for any other purpose than that defined in the Venue Act of

1891 [now Illinois Revised Statutes 1941, ch. 146, par. 36], and could therefore enter no order affecting the rights of the parties * * * that court was by said act empowered to transfer the cause to the proper county * * *, and under said act when said transfer was made the cause was from that time forward pending in the circuit court of Champaign County." (Emphasis and bracketed portion supplied.)

[fol. 53] The ruling in the Central Illinois Public Service Co. case, supra, to the effect that the Venue Act conferred on all courts of record in Illinois, without regard to any other jurisdiction either conferred upon or denied them, a "limited jurisdiction" to change the venue of any suit or proceeding improvidently brought in any such court to the proper court or county, was not in the slightest degree weakened, criticised or modified by the ruling in the case of Gill v. Lynch, 367 Ill. 203, 10 N. E. (2d) 812. On the contrary, the decision in Gill v. Lynch, supra, reaffirms the doctrine of the Central Illinois Public Service Co. case, for it holds that the transfer of the cause in the Gill case from the County Court to the Circuit Court, upon change of venue under the Venue Act, was valid, and ruled void only the orders appointing receivers, saying (10 N. E. [2d] 814):

> "These holdings conclusively demonstrate that the county court had no jurisdiction to hear a petition for appointment of a receiver or for any other purpose **except to transfer the cause to the proper court.** The appointments, and all subsequent orders, **except that transferring the cause**, being void, the cause therefore went to the circuit court **with the petitions for appointment of a receiver still pending and undetermined.**" (Emphasis ours.)

(B)

Furthermore, it should be noted that in the Central Illinois Public Service Co. case, supra, there was involved the question of whether, as the statute required, the suit there had been by writ of certiorari "commenced within twenty [fol. 54] days of the receipt of notice of the decision of the board." The opinion discloses that the decision of the Board had been rendered on August 10, 1918; that the praecipe for writ of certiorari had been filed on August 26, 1918, in the Circuit Court of Coles County—which Court,

the opinion rules, was without jurisdiction of the subject matter of the suit or of the administrator party; that the change of venue under the Venue Act was not applied for until May 3, 1919—many months after the decision of the Board; and that thereafter the change of venue was granted, and the transcript on change of venue filed in the Circuit Court of Champaign County. This Court there held that the suit was "commenced" within twenty days after the decision of the Board, *and when the proceeding was instituted by the filing of the praecipe for writ of certiorari in the Circuit Court of Coles County (which had no jurisdiction to hear and determine the merits of the suit)*, notwithstanding that the change of venue to the Circuit Court of Champaign County (which had jurisdiction to hear and determine the merits of the suit) did not take place until some months thereafter. It necessarily follows from that decision that it should be ruled in the case at bar that plaintiff's suit was "commenced within two years from the day the cause of action accrued" and when the proceedings were instituted in the City Court of Granite City, rather than when the change of venue to the Circuit Court of Madison County took place under the provisions of the Venue Act.

[fol. 55] III

This Honorable Court, in rendering its opinion and decision in this case, has overlooked, misconceived or misapprehended the effect of sustaining the plaintiff's position in this case.

On page 5 of the printed opinion in this case the Court has said:

> "When the present suit was filed in the city court of Granite City the defendants could have disregarded the summons, and judgment rendered in such court would have been without effect and no justification for seizing defendants' property on execution. Yet, if appellant's contention is sustained, a valid judgment could be obtained by transferring the cause to the proper court upon a summons or notice that defendants could safely disregard when served upon them. This would give the order of transfer by the city court the effect of vitalizing process that was void and **considering a case commenced and pending in a proper court during a period when, in legal contemplation, no judi-**

cial control of defendants had yet been exercised.'' (Emphasis ours.)

This quotation indicates that this Honorable Court conceives it to be necessary to the ''commencement'' and ''pendency'' of a suit that the Court in which the proceeding was instituted should have jurisdiction over the person of the defendant. Ordinarily, and in the absence of statutory restrictions, whether a suit is ''commenced'' or ''pending'' does not depend upon service of process upon the defendant, or the existence of jurisdiction over him (see 1 Corpus Juris Secundum, pp. 1396-1397, § 129), and in [fol. 56] Illinois the only requirement for the commencement of an action or suit is the filing of the complaint (see Illinois Revised Statutes 1941, chap. 110, par. 129). So, even if the summons issued out of the City Court in the case at bar could have been disregarded by defendants, and even if it should be necessary that a new summons or notice be issued out of the Circuit Court to which the venue had been changed, and served upon defendants, in order for plaintiff to secure the rendition of a valid judgment against defendants, the fact that such summons had not been issued and served would not alter the fact that plaintiff's suit had been ''commenced'' in the City Court, and thereafter remained ''pending.'' That is to say, plaintiff's suit had been ''commenced'' within the time required by the Federal Act, and thereafter remained ''pending,'' even though the City Court, and the Circuit Court to which the venue of the suit was changed under the Venue Act, had not acquired jurisdiction over the persons of the defendants.

In view of the fact that this Court has overlooked, misconceived or misapprehended the matters above pointed out, we urge that a rehearing should be granted, and that on such rehearing the judgment of the Circuit Court should be reversed, and this cause remanded for further proceedings.

Respectfully submitted, McGlynn & McGlynn, Mark D. Eagleton, Roberts P. Elam, Attorneys for Appellant.

[fol. 17] UNITED STATES OF AMERICA

STATE OF ILLINOIS
Supreme Court, ss:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the eighth day of November in the year of our Lord, one thousand nine hundred and forty-three, within and for the State of Illinois.

Present: June C. Smith, Chief Justice, Justice Clyde E. Stone, Justice Walter T. Gunn, Justice William J. Fulton, Justice Francis S. Wilson, Justice Loren E. Murphy, Justice Charles H. Thompson; George F. Barrett, Attorney General; Warren C. Murray, Marshal. Attest: Edward F. Cullinane, Clerk pro tempore.

Be It Remembered, that, to-wit: on the 12th day of November, A. D. 1943, the same being one of the days of the term of Court aforesaid, certain proceedings were had in said Court and entered of record in the words and figures following, to-wit:

No. 27275

VICTOR J. HERB, Appellant,

vs.

Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receiver for Wabash Railway Company, a corporation, Appellees.

APPEAL, CIRCUIT COURT, MADISON COUNTY

ORDER

And now on this day, the Court having duly considered the petition for rehearing filed by appellant in the above entitled cause, and the Court being fully advised in the premises.

It Is Ordered that the petition for rehearing be, and the petition for rehearing is hereby denied.

[fol. 18] UNITED STATES OF AMERICA

STATE OF ILLINOIS
Supreme Court, ss:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the eighth day of November in the year of our Lord, one thousand nine hundred and forty three, within and for the State of Illinois.

Present: June C. Smith, Chief Justice, Justice Clyde E. Stone, Justice Walter T. Gunn, Justice William J. Fulton, Justice Francis S. Wilson, Justice Loren E. Murphy, Justice Charles H. Thompson, George F. Barrett, Attorney General, Warren C. Murray, Marshal. Attest: Edward F. Cullinane, Clerk pro tempore.

Be It Remembered, that, to-wit: on the 19th day of November, A. D. 1943, the same being one of the days of the term of Court aforesaid, certain proceedings were had in said Court and entered of record in the words and figures following, to-wit:

No. 27275

VICTOR J. HERR, Appellant,

vs.

Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receiver for Wasbash Railway Company, a corporation,
Appellees.

APPEAL, CIRCUIT COURT, MADISON COUNTY

ORDER

Now on this day the Court having duly considered the motion by appellant to stay the mandate for a period of ninety days, and the Court being fully advised in the premises,

It Is Ordered that the mandate in the above entitled case be, and the mandate is hereby stayed for a period of ninety days.

[fol. 19] UNITED STATES OF AMERICA

STATE OF ILLINOIS
Supreme Court, ss:

I, Edward F. Cullinane, Clerk pro tempore of the Supreme Court of the State of Illinois, and keeper of the records and seal thereof, do hereby certify the foregoing to be a true copy of

1. abstract of record filed April 20, 1943
2. order of submission entered May 20, 1943
3. opinion filed September 24, 1943
4. mandate
5. petition for rehearing filed October 19, 1943
6. order denying petition for rehearing entered November 12, 1943.
7. order staying mandate for a period of ninety days entered November 19, 1943.

in a certain cause entitled in this Court

No. 27275

HEER, Appellant,

vs.

PITCAIRN, et al., etc., Appellees.

APPEAL, CIRCUIT COURT, MADISON COUNTY

Witness: my hand and seal of said Supreme Court, in Springfield, in said State, this first day of December A. D. 1943.

Edward F. Cullinane, Clerk pro tempore. (Seal.)

[fol. 60] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 27, 1944

The petition herein for a writ of certiorari to the Supreme Court of the State of Illinois is granted, and the case is consolidated with No. 682 for argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 25

BENJAMIN F. BELCHER, PETITIONER,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

PETITION FOR CERTIORARI FILED FEBRUARY 9, 1944.

CERTIORARI GRANTED MARCH 27, 1944.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 25

BENJAMIN F. BELCHER, PETITIONER,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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[fol. a] [Caption omitted]

[fol. 1]

IN THE SUPREME COURT OF ILLINOIS, MAY TERM, A. D. 1943

BENJAMIN F. BELCHER, Plaintiff-Appellant,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, a Corporation, Defendant-Appellee

Appeal from the Circuit Court of St. Clair County, State of Illinois

Hon. Alfred D. Riess, Trial Judge

Abstract of Record—Filed April 20, 1943

Placita and convening order of the Circuit Court of St. Clair County, Illinois, September 14, 1942.

Transcript of Proceedings in the City Court of East St. Louis, Illinois

(Filed in the Circuit Court of St. Clair County, Illinois, August 10, 1942)

Title page of transcript, with endorsement of filing in the Circuit Court of St. Clair County.

Placita and convening order in the City Court of East St. Louis, Illinois, June 22, 1940.

Index of transcript.

[fol. 2] COMPLAINT

(Filed in the City Court of East St. Louis, Illinois, June 22, 1940)

Benjamin F. Belcher, plaintiff, by Mark D. Eagleton and McGlynn & McGlynn, his attorneys, complaining of the Louisville & Nashville Railroad Company, a corporation, defendant, alleges:

1. That defendant now is, and at all times herein mentioned was, a railroad corporation duly organized and exist-

ing according to law, engaged in the business of owning and operating railroad systems, lines, properties, tracks, trains, engines and cars, and operating the same as a common carrier by railroad transporting freight and passengers for hire in interstate commerce to and from the State of Illinois, and to and from various other of the several states of the United States, and having an office and place of business, and doing business, in the City of East St. Louis, State of Illinois.

2. That on the 15th day of February, 1939, and for a long time prior thereto, plaintiff was a servant in the employ of defendant as a switchman working upon and about defendant's trains, engines and cars, and particularly in the terminal yards on defendant's lines at Nashville, Tennessee.

3. That, as such servant and employee, plaintiff earned an average of approximately $200.00 per month.

4. That on said 15th day of February, 1939, plaintiff was working as such servant and employee of defendant in said terminal yards, in, on and about the trains, engines and [fol. 3] cars then and there moved, hauled and used by defendant in the furtherance of defendant's aforesaid business of interstate commerce and transportation as a common carrier by railroad.

5. That, by reason thereof, plaintiff and defendant then and there became and were subject to certain statutes of the United States of America, then and there in full force and effect, relating to the liability of interstate common carriers by railroad for injury to and death of their employees, which said statutes are commonly known and referred to as the Federal Employers' Liability Act (45 U. S. C. A., §§ 51-59) and the Federal Safety Appliance Act (45 U. S. C. A., § 1-16).

6. That, under the aforesaid statutes, it became and was the duty of the defendant not to haul, nor permit to be hauled or used on its line, any car not equipped with an efficient hand brake as prescribed by the Interstate Commerce Commission of the United States of America by order promulgated and entered March 13, 1911, pursuant to the provisions of said statutes, and particularly the aforesaid Safety Appliance Act (45 U. S. C. A., §§ 11, 12).

7. That defendant disregarded its duty in this behalf, and then and there hauled and had in use upon its lines certain tank car which plaintiff was required to handle, use and work upon in the course of his employment by defendant as aforesaid, and which was not equipped with an efficient hand brake as prescribed by the aforesaid Safety Appliance Act and the aforesaid order of said Interstate Commerce Commission.

8. That while plaintiff was then and there engaged in interstate commerce and in the course and scope of his [fol. 4] employment, as aforesaid, and was upon and using said tank car aforesaid, plaintiff attempted to use the hand brake upon said tank car, and said hand brake did operate inefficiently and did give way and turn, causing plaintiff to be thrown from said car, to fall to the ground, and to sustain serious and permanent injuries and damages hereinafter more particularly set out, all of which resulted in whole or in part from the inefficiency of said hand brake and defendant's aforesaid violation of its duty in said Safety Appliance Act and the said order of the Interstate Commerce Commission promulgated and made pursuant thereto, as hereinbefore alleged.

9. That, by reason of defendant's aforesaid failure to have said tank car equipped with an efficient hand brake in violation of the aforesaid Safety Appliance Act and the aforesaid order of said Interstate Commerce Commission, plaintiff was injured and damaged as aforesaid in the following respects, to wit, that plaintiff's back, spine, spinal column, vertebrae, lumbosacral articulation, sacroiliac joints, shoulder, hip, pelvis and sacrum, and the bones, joints, muscles, tendons, ligaments, cartilages, nerves, vessels, tissues and skin thereof, were bruised, contused, wrenched, sprained, strained, twisted, distorted, rotated, crushed, compressed, deformed, torn, inflamed and irritated; that plaintiff sustained a sclerosis of the right lumbosacral articulation; that a pre-existing, but dormant, condition of arthritis in plaintiff's back, spine, hip and sacroiliac region was aggravated, inflamed, and rendered painful; that plaintiff sustained severe shock, and his nerves and nervous system were severely shocked; that plain [fol. 5] tiff suffered, suffers, and will in the future continue to suffer, severe pain of body and anguish of mind, and

from nervousness, loss of weight, weakness and insomnia; that plaintiff's ability and capacity to stand, walk, work, earn a livelihood and enjoy himself has been seriously, greatly and permanently impaired and diminished; that plaintiff has been totally and permanently disabled from performing his usual work and duties as a switchman, and from performing any work necessitating labor or activity; that plaintiff has lost his wages and earnings of approximately $200.00 per month since the date of his injury aforesaid, and will in the future continue to lose all or the greater portion thereof; that all of the aforesaid injuries, damages and effects are serious and permanent, and the function and use of all the aforesaid parts and organs have been seriously and permanently impaired, diminished and rendered painful, and that the plaintiff has been permanently reduced from a strong, able-bodied man, capable of earning a substantial livelihood, to a permanent cripple, incapable of earning a living or enjoying life.

Wherefore, plaintiff prays judgment against defendant in the sum of sixty thousand dollars ($60,000.00) and his costs herein.

Mark D. Eagleton, 1004 Telephone Bldg., St. Louis, Missouri; McGlynn & McGlynn, 120 North Main Street, East St. Louis, Illinois, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 6] Plaintiff requests the issue of summons for defendant in this cause.

Mark D. Eagleton and McGlynn & McGlynn, Attorneys for Plaintiff.

Plaintiff demands a trial by jury in this cause.

Mark D. Eagleton and McGlynn & McGlynn, Attorneys for Plaintiff.

Summons, issued June 22, 1940, and (on reverse side) sheriff's return.

Defendant's motion to dismiss or strike on account of insufficient complaint, filed in the City Court of East St. Louis, Illinois, July 9, 1940.

Defendant's answer, filed in the City Court of East St. Louis, July 30, 1940.

Plaintiff's reply to answer of defendant, filed in the City Court of East St. Louis, Illinois, August 26, 1940.

DEFENDANT'S AMENDED ANSWER—Filed in the City Court of East St. Louis, Illinois, September 9, 1940

1. This defendant, Louisville & Nashville Railroad Company, for answer to paragraph 1 of the complaint, admits the allegations of said paragraph 1.

2. This defendant denies that on the 15th day of February, 1939, at the time of his alleged injury, the plaintiff [fol. 7] was a servant in the employ of the defendant as a switchman, working upon and about defendant's train, engines and cars in the terminal yards on defendant's lines at Nashville Tennessee.

3. Denies that, as such servant and employee of this defendant, plaintiff earned an average of approximately $200.00 per month.

4. Denies that on said 15th day of February, 1939, at the time of his alleged injury, plaintiff was working as such servant and employee of this defendant in said terminal yards in, on and about engines and cars then and there used, hauled and moved by the defendant in the furtherance of its aforesaid business of interstate commerce and transportation as a common carrier by railroad.

5. Denies that by reason thereof plaintiff and defendant then and there became and were subject to certain statutes of the United States of America, then and there in full force and effect, relating to the liability of interstate common carriers by railroad for injury to and death of their employees, as in said section 5 of the complaint alleged, but states the fact to be that this defendant was engaged in interstate commerce, and that the plaintiff was not in its employ on the occasion of his injuries as in said complaint alleged.

6. This defendant admits paragraph 6 of the complaint.

7. This defendant denies that it disregarded its duty in this behalf and denies that it then and there hauled, and had in use, upon its lines, a certain tank car which plaintiff

was required to handle, use and work upon in the course of his employment by defendant, and which was not equip- [fol. 8] ped with an efficient hand brake, and denies that it was not equipped with a sufficient hand brake as prescribed by the aforesaid Safety Appliance Act and the aforesaid order of the Interstate Commerce Commission, and denies that plaintiff was employed by defendant on such car.

8. This defendant, answering paragraph 8 of the complaint, says that while the plaintiff was then and there engaged in the course and scope of his employment, and was upon and using said tank car, this defendant denies that the plaintiff attempted to use the hand brake upon said tank car, and denies that said hand brake did operate inefficiently, or that it gave way and turned, causing plaintiff to be thrown from said car, to fall to the ground, and to sustain serious and permanent injuries and damages as set out in said complaint; and denies that the plaintiff received any injuries on account thereof, in whole or in part, from the alleged inefficiency of said hand brake, and defendant's alleged violation of its duty under said Safety Appliance Act and order of the Interstate Commerce Commission, as in said paragraph 8 of the complaint alleged.

9. Denies that by reason of defendant's alleged failure to have said tank car equipped with an efficient hand brake, in violation of said Safety Appliance Act, and any order of the Interstate Commerce Commission, that plaintiff was injured and damaged as in said complaint alleged; denies that the plaintiff was injured or damaged by reason of any inefficient brake, and denies that he was injured or suffered any damages whatsoever by reason thereof; denies that the plaintiff, by reason of anything alleged in his [fol. 9] complaint, suffered any injury as therein alleged, or any damage as therein alleged, and denies that he is entitled to recover damages for said sum of $50,000.00, or any other sum on account thereof.

10. This defendant, further answering, denies that it is guilty of any negligence or default whatever in any respect charged against it, and especially denies that said hand brake on said car complained of by the plaintiff was in any respect inefficient.

11. And this defendant, further answering, says that it is a railroad corporation engaged in interstate commerce, and was so engaged on the 15th day of February, 1939, but denies that the cut of cars, including the tank car which plaintiff alleges had an inefficient brake, was in the custody or control of this defendant, or was being moved by this defendant; denies that the plaintiff, at the time he alleges he was in the employ of this defendant in the handling of such tank car, was its employee, but states that said plaintiff was not the employee of this defendant at the time, and in the handling of such tank car or the cut of cars of which said tank car was one, or that this defendant had any control over the plaintiff, and that therefore this defendant was not guilty of any of the charges of negligence made against it in the complaint herein, and is not liable to the plaintiff in damages for any sum whatsoever.

12. And, in the alternative, this defendant, further answering said complaint, states that on, to wit, the 15th day of February, 1939, the said railroad switching yards known as the Kayne Yards at Nashville, Tennessee, the yards in [fol. 10] which the plaintiff was then employed as a brakeman or switchman, were under lease from the Louisville & Nashville Terminal Company, a corporation under the general laws of Tennessee, to the Louisville & Nashville Railroad Company, and the Nashville, Chattanooga & St. Louis Railway Company jointly, and including track No. 104 in said yard on which the cut of cars, including the car which plaintiff alleges had an inefficient brake, were being operated; that the said Louisville & Nashville Railroad Company and the said Nashville, Chattanooga & St. Louis Railway Company, by mutual agreement, arranged for the maintenance and operation, for their joint use, of said switching yards by an unincorporated company known as Nashville Terminals, which said Nashville Terminals had a Board of Control, consisting of three men, a superintendent, and the general managers of the two said railroads, which said Nashville Terminals was to, and did, maintain and operate said yards for the said two railroad companies, the cost of operation by said Nashville Terminals of said switching yard being paid by the said railroads in the proportion of the number of cars of each railroad handled in said yards; that said railroad switching yard was being so operated under said joint lease as hereinabove

stated, on, to wit, the 15th day of February, 1939, and before and since that date, and including said track 104 in said yards over which said cut of cars and said tank car complained of by the plaintiff were being moved by said Nashville, Chattanooga & St. Louis Railway Company; that as to the movement, handling and condition of said tank car, and the brake thereon, if the same was inefficient and caused the plaintiff's alleged injuries, the said Nashville, Chattanooga & St. Louis Railway Company and the [fol. 11] Louisville & Nashville Railroad Company concurred in causing the tort and were joint tort-feasors; that on the 3rd day of April, 1939, the said plaintiff, for a valuable consideration, under agreement made and delivered by him in writing, released, settled with, acquitted and discharged the said Nashville, Chattanooga & St. Louis Railway Company, its officers and agents, of any and all liability to him of any damages of whatsoever kind and nature that he sustained or suffered, or that he may hereafter sustain or suffer, through, by or on account of said alleged accident and injuries, and acknowledged full satisfaction and discharge of all liability therefor, and thereby released and discharged this defendant, Louisville & Nashville Railroad Company, a joint tort-feasor, from any and all liability for damages on account of said alleged accident and injury, which said release and the warrant in payment of the amount for which said settlement was made, are in the form as shown by Exhibit A hereto, to this answer attached, hereby referred to and made a part hereof.

Wherefore, this defendant says that for the causes aforesaid it is fully discharged from said alleged obligation set out in the complaint herein and from any loss or damage resulting to the plaintiff by reason of anything in his complaint alleged, and said action is barred, and the defendant denies that it is indebted to the plaintiff in any sum whatever on account of the matters in said complaint set forth, and prays to be discharged with its costs, etc.

13. And, further answering in the alternative, this defendant says that for the injuries which plaintiff alleges in his complaint he suffered by reason of an inefficient [fol. 12] brake on a tank car in the terminal railroad yards at Nashville, Tennessee, on the 15th day of February, 1939, a claim was made by him against the Nashville, Chatta-

nooga & St. Louis Railway Company, as his employer, and that his claim for said injuries was paid by said Nashville, Chattanooga & St. Louis Railway Company, and accepted by him in full satisfaction and release of his said claim, and in full payment of his said injuries, as shown by his written release, in full satisfaction, and a draft in payment of such damages in full, a copy of which is Exhibit A to this answer, which is made a part hereof, and reference to which is hereby made. And this defendant avers that the accident and injuries aforesaid, which was settled for in full under the terms of said release, is the same accident and injuries for which plaintiff is claiming damages in this suit; that his right of action is extinguished; that the plaintiff cannot in law have more than one satisfaction for the same injury, and is estopped and barred from prosecuting this action, and that his release and satisfaction in full, as above set forth, for his said claim for damages, is a bar to this suit, and this defendant is entitled to the benefit of said satisfaction in full, and is not liable for such claim.

Wherefore, it prays to be dismissed with its costs, etc.

Farmer, Klingel & Baltz, 25 First National Bank Bldg., Belleville, Illinois, Attorneys for Defendant.

[fol. 13] We hereby acknowledge receipt of two copies of the foregoing amended answer this 9th day of September, 1940.

Eagleton, Waechter & Elam, Jos. B. McGlynn, Attorneys for Plaintiff.

EXHIBIT "A" TO AMENDED ANSWER

Whereas, I, B. F. Belcher of the County of Davidson, State of Tennessee, was injured on the 15th day of February, 1939, at or near Nashville, Tenn. station while engaged as a switchman in Nashville Terminals, riding a car off the south yard hump in Kayne Ave yards, was thrown, or fell, from moving car while tightening the brake.

And, Whereas, I have compromised, adjusted, and settled with the Nashville, Chattanooga & St. Louis Railway all differences arising out of the premises:

Now, therefore, in consideration of One Hundred and Sixty and 00 100 ($160.00) Dollars, to me in hand paid

by said Railway, the receipt of which is hereby acknowledged, I do hereby release, acquit, and discharge the said Nashville, Chattanooga & St. Louis Railway, its officers and agents, of any and all liability to me for any damages, of whatsoever kind and nature, that I have sustained or suffered, or which I may hereafter sustain or suffer, through, by or on account of said accident or injury, and I hereby acknowledge full satisfaction and discharge of all liability therefor.

It is distinctly understood and agreed by me that the sole and only consideration inducing me to the execution [fol. 14] of this release is the payment to me of the sum of money mentioned above.

The effect of this instrument is fully understood by me, and I sign it of my own free will and accord.

Witness my hand in duplicate, this the 3rd day of April 1939.

(Signed) B. F. Belcher.

In presence of (Signed) L. F. Owens, E. B. Duval, Witnesses.

[fol. 15]

The Nashville, Chattanooga & St. Louis Railway

Audit No. 916-Mch. 1939
Law Dept. No. 2 Mo. Apl.
Date of Vo. Apl. 4-1939

In full settlement and satisfaction of all claims by payee against NC&St. L. Ry. for injury received on or about Feby. 15th, 1939, while engaged as a switchman in Nashville Terminals, Kayne Ave. yards, being thrown or falling from a car while setting brake, as per release of this date.

Approved
L. E. McKeand
Comptroller

Audited
A. G. Miller
Auditor of Disbursements

In Settlement of Above Account
Pay
To
The
Order
Of

B. F. Belcher
Nashville, Tenn.

Nashville, Tenn.
Treasurer's No.

One Hundred and Sixty and No 100
Dollars $160.00

To

D. S. Huggins, Treasurer, The N., C. & St. L. Ry.—Nashville, Tennessee

This draft, when endorsed, is in full payment of the account stated herein

B. F. Belcher

[fol. 16] PLAINTIFF'S REPLY TO DEFENDANT'S AMENDED ANSWER—Filed in the City Court of East St. Louis, Illinois, September 23, 1940

Now comes Benjamin F. Belcher, plaintiff in the above-entitled cause, by Mark D. Eagleton and McGlynn & McGlynn, his attorneys, and for reply to the amended answer of defendant in this cause says:

1. For reply to paragraph 5 of defendant's amended answer, plaintiff admits the allegation that defendant was engaged in interstate commerce; denies the allegation that plaintiff was not in the defendant's employ on the occasion of his injury, as in his complaint alleged, and realleges and reaffirms the allegations of his complaint.

2. For reply to paragraph 10 of defendant's amended answer, plaintiff denies the allegations of said paragraph 10, and realleges and reaffirms the allegations of his complaint.

3. For reply to paragraph 11 of defendant's amended answer, plaintiff admits that defendant is a railroad corporation engaged in interstate commerce, and was so engaged on the 15th day of February, 1939; denies all other allegations of said paragraph 11, and realleges and reaffirms the allegations of his complaint.

4. For reply to paragraph 12 of defendant's amended answer, plaintiff denies the allegations of said paragraph 12, and realleges and reaffirms the allegations of his complaint.

4 (a). For further reply to said paragraph 12 of defendant's said amended answer, plaintiff states that he has no [fol. 17] knowledge of the alleged release and voucher referred to in said paragraph of defendant's said answer, and in the form attached to defendant's said answer as Exhibit A thereto; and plaintiff states the facts to be that on said 3rd day of April, 1939, the day said release and voucher alleged by defendant purports to have been executed, and at a time when plaintiff was still physically disabled on account of the injuries sustained by him as alleged in his complaint, plaintiff, at the special instance and request of defendant's claim agent, Ed B. Duval, went to

the office of said Ed B. Duval in Nashville, Tennessee; that the defendant's agents and servants stated and represented to plaintiff that his said injuries were not serious, and that if plaintiff would return to work the pains and disabilities which plaintiff was suffering from said injuries would clear up and disappear from the use of the parts of plaintiff's body in the performance of his regular work; that defendant's said claim agent then and there further stated and represented to plaintiff that defendant desired plaintiff to return to his work to determine whether he was capable of performing his duties, and that, if plaintiff was willing to return to work and attempt to perform his work, defendant was willing to give plaintiff $160.00 as the equivalent of half-time pay for the time which plaintiff had been off work on account of his said injuries, and that, in the event plaintiff found himself unable to perform his work on account of his said injuries, some other and further adjustment could and would be made respecting compensation to plaintiff for the injuries and damages sustained by him as alleged in his complaint herein; that, relying upon said statements and representations of defendant's said agents and servants, and while [fol. 18] exercising ordinary care to ascertain the consequences of his act, plaintiff was then and there induced by defendant's said claim agent to sign a theretofore prepared instrument thereupon produced by said claim agent, and represented by him to plaintiff as being a receipt for $160.00 half-time pay that plaintiff had lost up to that time on account of his said injuries, and upon which said instrument defendant's said claim agent secured for, and delivered to, plaintiff the sum of $160.00. Plaintiff further states that within a few days thereafter, and in accordance with the statements and representations of, and his agreement with, defendant's said claim agent, plaintiff returned to his regular work as a switchman for defendant, and attempted to perform his duties as such; that, because of his said injuries, plaintiff was unable to perform his said duties; that over a period of several weeks subsequent to April 3, 1939, plaintiff repeatedly made efforts to return to his said regular work and to perform the duties thereof, but was unable to do so because of his said injuries, which progressively became worse; that plaintiff's said injuries

finally compelled him to give up all efforts to return to and perform his said work, and that thereafter, although plaintiff requested defendant's said claim agent to make other and further adjustments respecting compensation to plaintiff for his said injuries and damages, defendant's said claim agent failed and declined so to do. Plaintiff further states that, if his signature was obtained to said release and voucher alleged and referred to by defendant, it was obtained without plaintiff ever knowing, assenting to, or agreeing to, the terms thereof, and was obtained by [fol. 19] false, fraudulent and deceitful misrepresentation by defendant's said claim agent (as hereinbefore alleged) that the instrument which plaintiff signed was merely a receipt for $160.00 as the equivalent of half-time pay for the time theretofore lost by plaintiff, by false, fraudulent and deceitful misrepresentation by defendant's agents and servants (as hereinbefore alleged) as to the nature and character of the instrument which plaintiff was induced by defendant's said claim agent to sign as aforesaid by the fraudulent purpose, design and intent on the part of defendant's said claim agent to cheat and defraud plaintiff out of his right of action set out in his complaint herein, and through plaintiff's belief in the aforesaid false and fraudulent misrepresentations by defendant's said agents and servants, as well as plaintiff's belief that said instrument signed by plaintiff, as aforesaid, was a receipt for half time pay for time theretofore lost by plaintiff on account of his said injuries, which could be executed by plaintiff without in any manner affecting his right of action alleged in his complaint herein.

Wherefore, plaintiff prays judgment that said release and voucher alleged by defendant be declared null and void, and that plaintiff have judgment as prayed in his complaint.

5. For reply to paragraph 13 of defendant's amended answer, plaintiff denies the allegations thereof, and here realleges, and by reference thereto here incorporates, the allegations of paragraph 4 (a) of this reply, the same as if said allegations were here set out in detail.

[fol. 20] Wherefore, plaintiff prays judgment that said release and voucher alleged by defendant be declared null

and void, and that plaintiff have judgment as prayed in his complaint.

Mark D. Eagleton, McGlynn & McGlynn, Attorneys for Plaintiff.

Duly sworn to by Benjamin F. Belcher. Jurat omitted in printing.

Notice to sue out dedimus potestatum for taking depositions.

Affidavit for the taking of depositions.

Instructions given and refused at the trial of this cause in the City Court of East St. Louis, Illinois, October 16, 1940.

Form of verdict (not used).

[fol. 21] VERDICT

Verdict in favor of the plaintiff and against the defendant in the sum of $20,000.00, filed in the City Court of East St. Louis, Illinois, October 16, 1940.

Defendant's motion for a new trial, filed in the City Court of East St. Louis, Illinois, October 22, 1940.

Motion of defendant for judgment non obstante veredicto, filed in the City Court of East St. Louis, Illinois, October 22, 1940.

RULING OF THE COURT ON DEFENDANT'S MOTION FOR A NEW TRIAL.—Filed in the City Court of East St. Louis, Illinois, September 18, 1941

On the motion filed by the defendant, the trial court has endeavored to give the motion and the various assigned errors in support thereof full and due consideration, and has carefully read and considered the briefs and reply briefs submitted in this connection, and, I might say, that, in addition thereto, an individual research was made by me as to the law as applied to the motion upon the errors assigned.

From the facts in the case, as aided by the notes taken at the hearing, the Court is of the opinion that the verdict is manifestly contrary to the preponderance or weight of the evidence, and in view of this conclusion it will be un-

necessary for me to pass directly upon the various other errors assigned.

The evidence, in view of the trial court on behalf of the plaintiff, does not warrant the verdict upon the main question involved in the case, namely, whether or not the plaintiff was injured as claimed; neither does the evidence justify the setting aside of the release which was executed by [fol. 22] the plaintiff. It will serve no purpose to narrate the evidence in detail, or comment thereon; suffice to say that in the opinion of the Court the evidence on behalf of the plaintiff falls far short from the rule of requiring the plaintiff to prove his case by the greater weight or preponderance of the evidence.

The motion of the defendant for a new trial in the above-entitled case will be granted. The motion of the defendant for a judgment in favor of the defendant and against the plaintiff notwithstanding the verdict in the case will be denied. The clerk of the court will enter the following order:

> "Motion for a new trial granted and the verdict of the jury is set aside. Motion of defendant for judgment non obstante veredicto denied."

Anticipating that perhaps the plaintiff may desire an appeal from this order, granting a new trial to the Appellate Court, in event such a motion is made, the Court will grant an appeal to the Appellate Court to the plaintiffs upon their filing an appeal bond, to be approved by the clerk of this court, in the sum of $750.00, with the clerk of the court within thirty (30) days from the date of this order, with bill of exceptions to be filed within sixty (60) days.

It is ordered that this memorandum shall be filed in the files of this case, and the clerk enter orders herein directed.

John W. (illegible), Presiding Judge.

[File endorsement omitted.]

[fol. 23] Copy of letter from defendant's counsel addressed to plaintiff's counsel, filed in the City Court of East St. Louis, Illinois, June 16, 1942.

Defendant's motion to dismiss for lack of jurisdiction of the subject matter filed in the City Court of East St. Louis

PLAINTIFF'S MOTION FOR A CHANGE OF VENUE—Filed in the City Court of East St. Louis, Illinois, June 16, 1942

Comes now Benjamin F. Belcher, plaintiff in the above-entitled cause, by Mark D. Eagleton and McGlynn & McGlynn, his attorneys, and states to and shows the Court that:

1. This suit or action was commenced in this court on or about the 22nd day of June, 1940;

2. As appears from the pleadings heretofore filed in this court in this cause, plaintiff's cause of action against defendant, which is involved in this suit or action, is a transitory cause of action which arose in or near the City of Nashville, State of Tennessee;

3. The Supreme Court of Illinois, in the case of Paul W. Werner, Appellee, v. Illinois Central Railroad Company, Appellant, No. 26,293 in said Supreme Court of Illinois, decided March 16, 1942, rehearing denied June 9, 1942, and not yet reported, has ruled that each of the various City Courts in the State of Illinois is without jurisdiction to hear and determine any suit or action involving a cause of action which arose outside the city where said court is located; and

[fol. 24] 4. By reason of the premises, this suit or action has been commenced, and is pending, in the wrong court, and the venue thereof should be changed to a proper court, pursuant to the terms and provisions of Chap. 146, Par. 36, Illinois Revised Statutes 1941.

Plaintiff further states that he is ready, willing and able, and hereby offers, to pay any and all costs required of him by the terms and provisions of said Chap. 146, Par. 36, Illinois Revised Statutes 1941.

Wherefore, plaintiff moves this Court, pursuant to the terms and provisions of said Chap. 146, Par. 36, Illinois Revised Statutes 1941, to change the venue of this suit or action to a proper court, to wit, the Circuit Court of St. Clair County, State of Illinois.

Mark D. Eagleton, McGlynn & McGlynn, Attorneys for Plaintiff Benjamin F. Belcher.

Receipt of a copy of the above and foregoing motion is hereby acknowledged this 16 day of June, 1942.

Filing endorsement (on reverse side of page).

Notice of hearing on plaintiff's motion for change of venue, filed in the City Court of East St. Louis, Illinois, June 16, 1942.

[fol. 25] **Orders of the City Court of East St. Louis, Illinois**

Now on this 9th day of July, 1940, motion to dismiss or strike on account of insufficient complaint is filed herein.

ORDER DENYING MOTION TO STRIKE COMPLAINT

And now on this 19th day of July, 1940, the same being a judicial day of this court, come the parties to this suit, by their respective counsel, for a hearing on the motion heretofore filed herein to strike the complaint; said motion is presented to Presiding Judge W. W. Damron, sitting at the request of Judge William F. Borders, and after arguments of counsel and due deliberation by the Court, said motion is denied; and it is ordered by the Court that the defendant be and it is hereby required to answer on or before August 12, 1940.

And now on this 9th day of September, 1940, leave is given defendant to file an amended answer herein, and same filed.

ORDER DENYING MOTION FOR DIRECTED VERDICT

And now on this 14th day of October, 1940, the same being a judicial day of this court, come again the parties to this suit, by their respective counsel, and case is called for trial by Presiding Judge J. W. Preibs, sitting at the request of Judge William F. Borders; and issues being joined, it is ordered that a jury come, whereupon comes the jury, twelve good and lawful persons, duly selected, tried and sworn according to law, well and truly to try the issues joined herein and a true verdict render; opening statements are made, witnesses sworn and testimony presented; and at the close of all of the evidence offered on behalf of the plaintiff, defendant presents a motion for a directed verdict in favor of [fol. 26] defendant, and said motion is denied and instruction refused. And the hour for adjournment having arrived, it is ordered by the Court, that this Court take a re-

And now on this 15th day of October, 1940, the same being a judicial day of this court, come again the parties to this suit, by their respective counsel, and the jurors heretofore impaneled herein for the trial of this cause also come, and court proceeds; and testimony is presented on behalf of the defendant and evidence concluded; and the hour for adjournment having arrived, it is ordered by the Court, that this Court take a recess until tomorrow morning at 10 o'clock, and the jurors be permitted to separate until that time.

ORDER DENYING MOTION FOR DIRECTED VERDICT

And now on this 16th day of October, 1940, the same being a judicial day of this court, come again the parties to this suit, by their respective counsel, and the jurors heretofore impaneled herein for the trial of this cause also come, and court proceeds; and at the close of all of the evidence introduced in this cause, defendant offers a motion for an instructed verdict in favor of the defendant, and said motion is denied and instruction refused; and the jurors, after hearing all of the evidence adduced, arguments of counsel and instructions of the Court, retire in charge of two sworn officers to consider of their verdict, and on the same day the jury reports and returns into open court the following verdict:

VERDICT

"We, the jury, find the defendant guilty and we assess the plaintiff's damages at Twenty Thousand Dollars ($20,000.00)."

[fol. 27] And now on this 8th day of November, 1940, the same being a judicial day of this court, come again the parties to this suit, by their respective counsel, for a hearing on the motion for judgment notwithstanding the verdict and motion for a new trial heretofore filed herein; and it is ordered by the Court that defendant submit brief and argument in writing by November 15, 1940, and plaintiff within ten days thereafter.

ORDER GRANTING MOTION FOR NEW TRIAL, ETC.

And now on this 18th day of September, 1941, the same being a judicial day of this court, after due deliberation by

of the jury is set aside; and motion of defendant for judgment non obstante veredicto is denied.

In event of appeal, it is ordered by the Court that the appeal bond be, and the same is hereby fixed at the penal sum of seven hundred fifty dollars ($750.00).

And now on this 19th day of January, 1942, defendant's motion to dismiss for lack of jurisdiction of the subject matter is filed herein.

And now on this 16th day of June, 1942, plaintiff's motion for a change of venue and notice are filed herein.

And now on this 19th day of June, 1942, the same being a judicial day of this court, come again the parties to this suit, by their respective counsel, and motion for transfer of suit because cause of action is pending in the wrong court is presented to the Court and argued by respective counsel, James A. Farmer for defendant, and Roberts P. Elam for plaintiff; and it is ordered by the Court that time be and is hereby given to furnish briefs herein.

[fol. 28] And now on this 17th day of July, 1942, the same being a judicial day of this court, upon the arguments heretofore heard and the briefs submitted herein, motion to have this suit transferred to the Circuit Court of St. Clair County, Illinois, is allowed, after due deliberation by the Court, and it is ordered by the Court that the clerk of this court transmit the files in this suit, together with a copy of the court orders, to the Circuit Court of St. Clair County, Illinois, for further proceedings, as per written order signed by the Judge.

Order Granting Change of Venue — Filed in the City Court of East St. Louis, Illinois, July 17, 1942

Motion of plaintiff for change of venue from this court to the Circuit Court of St. Clair County, Illinois, pursuant to the provisions of Chapter 146, Paragraph 36, Illinois Revised Statutes 1941, heretofore filed, is presented and argued

The Court having considered the matter and being fully advised in the premises, grants said motion and change of venue of said cause from the City Court of East St. Louis, Illinois, to the Circuit Court of St. Clair County, Illinois; and plaintiff is hereby assessed with all costs in this suit no

except such costs as shall have been occasioned by the defendant's answer to the complaint and the trial heretofore had herein, which said costs shall abide final judgment herein. The clerk of this court is hereby instructed and directed to transmit all and singular a transcript of the [fol. 29] record and proceedings in this case in this court, together with all orders, papers, pleadings and files to the Clerk of the Circuit Court of St. Clair County, Illinois, without delay, for further proceedings in the Circuit Court of St. Clair County, Illinois.

William F. Borders, Judge of the City Court of East St. Louis, Illinois.

Certificate of the Clerk of the City Court of East St. Louis, Illinois, to the transcript and file, filed in the Circuit Court of St. Clair County, Illinois, on August 10, 1942, which said certificate is dated August 10, 1942.

DEFENDANT'S MOTION TO QUASH THE PROCESS OF SUMMONS ISSUED OUT OF THE CITY COURT OF THE CITY OF EAST ST. LOUIS, AND TO DISMISS CAUSE—Filed in the Circuit Court of St. Clair County, Illinois, August 15, 1942

And now comes the defendant, Louisville & Nashville Railroad Company, by Farmer, Klingel & Baltz, its attorneys, and enters its limited and special appearance herein for the sole purpose of this motion to quash the summons heretofore issued by order of the City Court of the City of East St. Louis in this cause, and to dismiss this suit.

The transcript herein shows that the plaintiff's alleged cause of action accrued on February 15, 1939, in the State of Tennessee, and beyond and outside of the city limits of the City of East St. Louis, Illinois, and that this suit is [fol. 30] predicated on the Federal Employers' Liability Act only.

1. This defendant, therefore, moves the Court to quash the process of summons heretofore issued by order of the City Court of East St. Louis, Illinois, in this cause, of date the 22nd day of June, 1940, for the reason that the City Court of the City of East St. Louis had no jurisdiction under

2. The process of summons issued out of said City Court of East St. Louis, Illinois, and served on the defendant in this cause, is void and ineffective for the reason that said Court had no jurisdiction of said suit.

3. This suit having originated in the State of Tennessee, and not within the city limits of East St. Louis, the process of summons issued herein by the City Court of East St. Louis should be quashed, because the same is void and of no validity and of no effect.

4. And this defendant moves to dismiss said suit for the reasons above stated, and because this suit is predicated on the Federal Employers' Liability Act, and the limitation within which said suit shall be instituted under said act has long expired and this suit is now barred.

5. That there has been no service on this defendant of process of summons herein out of this court.

6. This suit is predicated on the Federal Employers' Liability Act, and the limitation within which suit shall be instituted under said act has long expired, and this suit is now barred.

[fol. 31] 7. Section 36 of Chapter 146 of the Venue Act of the Revised Statutes of Illinois has no application to suits involving the Federal Employers' Liability Act, where the cause of action arose beyond and outside the city limits of the City of East St. Louis.

8. The plaintiff's alleged cause of action involved in this controversy arose in the State of Tennessee, and out of and entirely beyond the city limits of the City of East St. Louis, and over which the City Court of the City of East St. Louis has no jurisdiction.

9. That the City Court of East St. Louis, being without jurisdiction of the subject matter of this cause, under the provisions of Section 1 of Article VI of the Constitution of 1870 of the State of Illinois, has no authority, power or jurisdiction to transfer this cause to another court.

10. This alleged cause of action accrued on February 15, 1938, in the State of Tennessee, as shown by the trans-

under the provisions of Section 6 of the Federal Employers' Liability Act, and cannot be instituted nor maintained in any court.

11. A cause of action accruing on February 15, 1939, is limited to two years within which suit may be brought, predicated on the Federal Employers' Liability Act, and the time within which suit may be brought cannot be extended by any state law or court order.

12. The City Court of the City of East St. Louis, being without jurisdiction of this cause, had not the power and [fol. 32] authority to transfer or change the venue of the same to the Circuit Court of St. Clair County, Illinois; and said Circuit Court is not authorized by law to receive by transfer or change of venue a cause from the City Court of East St. Louis which that Court has no jurisdiction to hear and determine.

Wherefore, this defendant moves to quash said summons heretofore issued by the City Court of East St. Louis and to dismiss this suit for the reasons hereinabove set forth.

Farmer, Klingel & Baltz, Attorneys for Defendant, Louisville & Nashville Railroad Company.

Orders of the Circuit Court of St. Clair County, Illinois.

Order Sustaining Defendant's Motion to Dismiss, and Entering Judgment of Dismissal—Entered in the Circuit Court of St. Clair County, Illinois, November 27, 1942

Now on this 27th day of November, A. D. 1942, briefs of all parties duly furnished and motions heretofore duly heard and cause is taken on oral arguments and briefs of the respective parties. Defendant's motion is duly considered by the Court and the Court allows said motion. It is therefore ordered by the Court that this suit be and the same is hereby dismissed at the cost of the plaintiff. It is further ordered and adjudged that the plaintiff take nothing by this suit and that the defendant go hence without day. Plaintiff excepts. Execution ordered to issue.

[fol. 33] Certificate of Trial Judge—Filed in the Circuit Court of St. Clair County, Illinois, February 23, 1943

I, Alfred D. Riess, Judge of the Circuit Court of St. Clair County, State of Illinois, before whom and by whom the above-entitled cause was heard and final order and judgment of dismissal therein entered, do hereby certify that there is involved in said case, and in said final order and judgment, a construction of the Constitution, and the validity of a statute, to wit, Section 36 of Chapter 146, Revised Statutes of Illinois 1941, and certain other Illinois statutory provisions to be therewith construed.

I further certify that, in my opinion, the public interest requires that the appeal herein shall be taken directly to the Supreme Court of Illinois.

Dated this 13 day of February, 1943.

Alfred D. Riess, Judge of the Circuit Court of St. Clair County, Illinois.

Notice of Appeal

Plaintiff-appellant's notice of appeal to the Supreme Court of Illinois from the Circuit Court of St. Clair County, Illinois, filed February 23, 1943, appealing from the whole of the order and final judgment entered in this cause on the 27th day of November, 1942; sustaining defendant-appellee's motion to dismiss and dismissing plaintiff-appellant's action and cause at his cost, and asking by way of relief that said order and judgment be reversed and the cause remanded to said Circuit Court of St. Clair County, Illinois, with directions to reinstate plaintiff-appellant's [fol. 34] cause upon the docket of said Circuit Court for further proceedings therein, to set aside and vacate said order, ruling and judgment sustaining defendant-appellee's motion to dismiss and dismissing plaintiff-appellant's cause, and to overrule defendant-appellee's motion to dismiss, with the certificate of the Clerk of said Circuit Court as to the filing of said notice of appeal, together with proof of service of a copy of said notice of appeal upon opposing counsel on February 23, 1943.

Praecipe for record, with proof of service of copy thereof

Certificate of the Clerk of the Circuit Court of St. Clair County, Illinois, to the transcript of record, dated March 22, 1943.

The above and foregoing is respectfully submitted as and for plaintiff-appellant's abstract of record herein.

McGlynn & McGlynn, 120 North Main Street, East St. Louis, Illinois; Mark D. Eagleton, 3746 Grandel Square, St. Louis, Missouri; Roberts P. Elam, 706 Chestnut Street, St. Louis, Missouri, Attorneys for Plaintiff-Appellant.

[fol. 3] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court ss:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the tenth day of May in the year of our Lord, one thousand nine hundred and forty-three, within and for the State of Illinois.

Present: Clyde E. Stone, Chief Justice, Justice Francis S. Wilson, Justice Loren E. Murphy, Justice William J. Fulton, Justice Walter T. Gunn, Justice June C. Smith, Justice Charles H. Thompson, George F. Barrett, Attorney General, Warren C. Murray, Marshal, Attest: Edward F. Cullinane, Clerk pro tempore.

Be it remembered, that, to-wit: on the 20th day of May, A. D. 1943, the same being one of the days of the term of Court aforesaid, an order of submission was entered by the Supreme Court of Illinois in the same case, which order of submission is in the words and figures following, to-wit:

[fol. 4] No. 27276

BENJAMIN F. BELCHER, Appellant

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, a corporation, Appellee

Appeal, Circuit Court, St. Clair County.

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this Court, and it appearing to the Court that appellant hath filed herein a duly certified transcript of the record and proceedings of the Court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellee

Having entered motion to affirm said judgment and for costs and procedendo, and said motions being taken under advisement for final hearing, and the Clerk of this Court

said cause is here submitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

[fol. 5] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the thirteenth day of September in the year of our Lord, one thousand nine hundred and forty-three, within and for the State of Illinois.

Present: June C. Smith, Chief Justice; Justice Clyde E. Stone, Justice Walter T. Gunn, Justice William J. Fulton, Justice Francis S. Wilson, Justice Loren E. Murphy, Justice Charles H. Thompson; George F. Barrett, Attorney General; Warren C. Murray, Marshal.

Attest: Edward F. Cullinane, Clerk pro tempore.

Be it remembered, that, to-wit: on the 24th day of September, A. D. 1943, the same being one of the days of the term of Court aforesaid, an opinion was filed by the Supreme Court of Illinois in the office of the clerk of the Supreme Court of Illinois, in the same case, which opinion is in the words and figures following, to-wit:

[fol. 6] Docket No. 27276—Agenda 41—May, 1943

BENJAMIN F. BELCHER, Appellant,

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellee

Mr. Justice WILSON delivered the opinion of the court:

June 22, 1940, the plaintiff, Benjamin F. Belcher, brought an action in the city court of East St. Louis against the defendant, the Louisville & Nashville Railroad Company, seeking to recover damages under the Federal Employers' Liability Act for injuries sustained on February 15, 1939,

favor of plaintiff. Defendant's motion for a new trial was granted, the verdict set aside and a new trial ordered. January 19, 1942, defendant interposed its motion to dismiss the cause for the reason that the city court lacked jurisdiction of the subject matter. Thereafter, on March 16, 1942, this court held that a city court has no jurisdiction of a cause of action under the Federal Employers' Liability Act where the accidental injuries occurred, as here, without the territorial limits of the city. (*Werner* v. *Illinois Central Railroad Co.* 379 Ill. 559; *Mitchell* v. *Louisville & Nashville Railroad Co.* 379 Ill. 522). Subsequently, plaintiff filed a motion in the city court of East St. Louis for a change of venue to the circuit court of St. Clair county on the ground that his action had been commenced, and was pending, in the wrong court and that, consequently, the venue should be changed to a proper court, pursuant to the statute pertaining to change of venue in such cases. (Ill. Rev. Stat. 1941, chap. 146, par. 36.) July 17, 1942, this motion was sustained and, on August 10, 1942, a certified transcript of the entire record in the city court of East St. Louis was filed in the circuit court of St. Clair county. Defendant, appearing specially, made a motion to quash the summons issued by the city court and to dismiss the cause for the reason, among others, that the cause having been ordered transferred to the circuit court on July 17, 1942, more than two years after the date plaintiff suffered his injuries, namely, February 15, 1939, he could neither institute nor maintain his action in the circuit court since it had not been commenced within the two years from the day the cause of action accrued, conformably to section 6 of the Federal Employers' Liability [fol. 7] Act. (Section 56, Title 45, U. S. C. A. 1941.) November 27, 1942, the motion was sustained and judgment rendered in favor of defendant. Plaintiff prosecutes a direct appeal to this court, the trial judge having certified that a construction of the constitution and the validity of the above statute concerning venue are involved.

Upon parallel facts, *Herb* v. *Pitcairn*, No. 27275, decided this day, holds that an action is not commenced within two years of the date of injury in a court of competent jurisdiction, as prescribed by section 6 of the Federal Employers' Liability Act, by transferring the cause from a city court lacking jurisdiction of the subject matter at a date when

court, could not be maintained because not commenced within the statutory time. Our disposition of the identical issue in *Herb* v. *Pitcairn* is decisive here.

The judgment of the circuit court is affirmed.

Judgment affirmed

[fol. 8] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

At a Supreme Court, begun and held in Springfield, on Monday, the 13th day of September in the year of our Lord, one thousand nine hundred and forty three, within and for the State of Illinois.

Present: June C. Smith, Chief Justice; Justice Clyde E. Stone, Justice Walter T. Gunn, Justice William J. Fulton, Justice Francis S. Wilson, Justice Loren E. Murphy, Justice Charles H. Thompson; George F. Barrett, Attorney General; Warren C. Murray, Marshal.

Attest: Edward F. Cullinane, Clerk por tempore.

Be It Remembered, that, to-wit: on the 24th day of September, A. D. 1943 the same being one of the days of the said term of said Supreme Court, certain proceedings were had in said court and entered of record in the words and figures following, to-wit:

No. 27276

BENJAMIN F. BELCHER, Appellant,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, a Corporation, Appellee

Appeal from Circuit Court, St. Clair County. 7225

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here that neither in

of the judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

Therefore, it is considered by the Court that the judgment of the circuit court of St. Clair county aforesaid, Be Affirmed in All Things and Stand in Full Force and Effect, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said appellee recover of and from the said appellant Costs by it in this behalf expended, to be taxed, and that it have execution therefor.

I, Edward F. Cullinane, Clerk pro tempore of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 24th day of September A. D. 1943.

Edward F. Cullinane, Clerk pro tempore, Supreme Court of the State of Illinois. (Seal.)

[fol. 9] And afterwards, to-wit: on the 19th day of October, A. D. 1943, the same being one of the days in vacation after the term of Court aforesaid, there was filed by appellant in the office of the Clerk of the Supreme Court of Illinois in the same case, a petition for rehearing, which petition is in the words and figures following, to-wit:

[fols. 40-41] In the Supreme Court of Illinois

Appellant's Petition for Rehearing—Filed October 19, 1943

Comes now Benjamin F. Belcher, by McGlynn & McGlynn, Mark D. Eagleton and Roberts P. Elam, his attorneys, and presents his petition for a rehearing of the above-entitled cause, and respectfully prays that a rehearing be granted in said cause on the grounds and for the reasons in the petition herewith presented.

McGlynn & McGlynn, Mark D. Eagleton, Roberts P. Elam, Attorneys for Appellant Benjamin F. Belcher.

[fol. 42] May It Please the Court:

I

This Honorable Court, in rendering its opinion and decision in this case, has overlooked, misconceived or misapprehended the point that, notwithstanding that the City Court of East St. Louis was without jurisdiction to hear and determine the merits of plaintiff-appellant's action against defendant-appellee, plaintiff's said action was "commenced" in that City Court within the two-year period prescribed by Section 6 of the Federal Employers' Liability Act (45 U. S. C. A. [1934 Edition], § 56), and that the City Court had a limited jurisdiction over that action, by virtue of the Illinois Revised Statutes 1941, Chapter 146, par. 36, which authorized and empowered the City Court to change the venue of such action to the Circuit Court of St. Clair County, which had jurisdiction to hear and determine the merits of plaintiff's case.

Since the opinion in this case is predicated solely upon, and by reference incorporates, the opinion in Herb v. Pitcairn, No. 27275, decided concurrently with the instant case, we are compelled to advert to the opinion in the Herb case for the reasons upon which the decision in the instant case was based.

On page 1 of the printed opinion in the Herb v. Pitcairn case, this Honorable Court fully recognized that the plaintiff's action was "commenced within two years from the [illegible] required by Section 6

of the Federal Employers' Liability Act, for this Court there said:

> "The facts in the case are substantially as follows: The plaintiff was an employee of the receivers of the Wabash Railway Company, and December 22, 1937, [fol. 43] **commenced an action** in the City Court of Granite City, Illinois, against the defendants, stating a cause of action under the Federal Employers' Liability Act for injuries claimed to have been sustained in the City of Decatur, Illinois, November 23, 1936." (Emphasis ours.)

However, this Court overlooked, misconceived or misapprehended the requirements of that section of the Federal Act, for on pages 2 and 3 of the printed opinion of that case it said:

> "The material point for consideration is whether the plaintiff has commenced an action within two years of the date of his injury **in a court having jurisdiction to hear and determine the same, as required by Section 6 of the Federal Employers' Liability Act**, by transferring the cause from a court having no jurisdiction over it at a date which, if then originally filed in the latter court, could not be maintained because not filed within the statutory time." (Emphasis ours.)

And, again, on page 4 of the printed opinion, it further said:

> "Applying now these principles to the facts before us we observe recovery under the Federal Employers' Liability Act is conditioned upon two things: (1) Commencing an action within two years from the date of the injury; and (2) **commencing such action in a court having jurisdiction to hear and determine the same.** * * * The plaintiff having predicated his case upon the Federal Employers' Liability Act must comply with its provisions, both with respect to the time of commencing the suit **and of bringing it in a court having jurisdiction to hear and determine it.**" (Emphasis ours.)

[fol. 44] We respectfully submit that Section 6 of the Federal Employers' Liability Act does not necessarily require

that actions thereunder must be "commenced" in a court having jurisdiction to hear and determine the merits of the action. We recognize that a suit is not "commenced" until a proceeding is instituted in a court which has acquired jurisdiction of something in relation to the controversy. We submit that, in the instant case, the City Court of East St. Louis had acquired jurisdiction over the person of plaintiff when he applied for its power and assistance in connection with his rights under the law, and that it then had—by virtue of Illinois Revised Statutes 1941, Chap. 146, par. 36—a limited jurisdiction to transfer plaintiff's action, by change of venue, to a "proper court" having jurisdiction to hear and determine the merits of that action. This transfer by change of venue, as pointed out at pages 24 and 25 of appellant's original brief herein and again at pages 6 and 7 of appellant's reply brief herein, did not constitute the dismissal of plaintiff's suit in the City Court and the commencement of a new suit in the Circuit Court, but constituted merely one of the steps or proceedings in the prosecution of the suit commenced in the City Court and ultimately to be determined on its merits in and by the Circuit Court. It thus appears that when plaintiff commenced his action in the City Court of East St. Louis, within two years from the date his cause of action accrued, he fully complied with the requirements of Section 6 of the Federal Employers' Liability Act, which, in so far as is here material, provided:

> "No action shall be maintained under this chapter unless commenced within two years from the day the [fol. 45] cause of action accrued. * * * The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States. * * *."

II

This Honorable Court, in rendering its opinion and decision in this case, has overlooked, misconceived or misapprehended the opinion and decision of this Court in Central Illinois Public Service Co. v. Industrial Commission, 293 Ill. 62, 127 N. E. 80, and the effect of that decision upon the case at bar.

(A)

On page 6 of the printed opinion in the Herb v. Pitcairn case, with reference to the decision in the Central Illinois Public Service Co. case, this Court said:

> "In that case we held the venue statute in Illinois, as applying to a circuit court having no jurisdiction over the subject matter, has no other purpose than to authorize a transfer to another circuit court which had, but does not affect any of the other rights of the parties."

And on page 7 of the printed opinion this Court in that connection further said:

> "The distinction to be drawn is that if a case is improperly filed in a court having jurisdiction of the cause generally, but without its territorial jurisdiction, it may be transferred to the proper circuit court. But, **if the cause is filed in a court which could never lawfully acquire jurisdiction**, the transfer to a court which would have had jurisdiction gives no validity to the proceedings in the first court." (Emphasis ours.)

[fol. 46] In making this last statement we respectfully submit, this Honorable Court has overlooked that under the facts in the Central Illinois Public Service Co. case, supra, the Circuit Court of Coles County "could never lawfully acquire jurisdiction" to hear and determine the merits of, or over the person of the administrator party in, the suit there commenced in that court. This Court, nevertheless, there ruled that the Circuit Court of Coles County, by virtue of what is now Illinois Revised Statutes 1941, chap. 146, par. 36, was vested with a limited jurisdiction which empowered that Court to change the venue of that suit to the Circuit Court of Champaign County, which was a "proper court" having jurisdiction of the subject matter of the suit and the means of acquiring jurisdiction over the person of the administrator involved therein. This Court, with reference to the effect of the act which is now Illinois Revised Statutes 1941, chap. 146, par. 36, there specifically ruled that (293 Ill. l. c. 69):

> "By this act it is evident that **the legislature intended to and did confer on all courts of record in**

this State, without regard to any other jurisdiction either conferred upon or denied it by common law or statute, jurisdiction to 'change the venue of such suit or proceeding to the proper court or county.' It cannot be doubted that the power to confer that **limited jurisdiction** lies within the powers of the legislature, and * * * while the circuit court of Coles County had no jurisdiction of the subject matter involved for any other purpose than that defined in the Venue Act of 1891 [now Illinois Revised Statutes 1941, ch. 146, par. 36], and could therefore enter no order affecting the rights of the parties * * * that court was by said act empowered to transfer the cause to the proper [fol. 47] county * * *, and under said act when said transfer was made the cause was from that time forward pending in the circuit court of Champaign County." (Emphasis and bracketed portion supplied.)

The ruling in the Central Illinois Public Service Co. case, supra, to the effect that the Venue Act conferred on all courts of record in Illinois, without regard to any other jurisdiction either conferred upon or denied them, a "limited jurisdiction" to change the venue of any suit or proceeding improvidently brought in any such court to the proper court or county, was not in the slightest degree weakened, criticized or modified by the ruling in the case of Gill v. Lynch, 367 Ill. 203, 10 N. E. (2d) 812. On the contrary, the decision in Gill v. Lynch, supra, reaffirms the doctrine of the Central Illinois Public Service Co. case, for it holds that the transfer of the cause in the Gill case from the County Court to the Circuit Court upon change of venue under the Venue Act, was valid, and ruled void only the orders appointing receivers, saying (10 N. E. [2d] 814):

> "These holdings conclusively demonstrate that the county court had no jurisdiction to hear a petition for appointment of a receiver or for any other purpose **except to transfer the cause to the proper court.** The appointments, and all subsequent orders, **except that transferring the cause,** being void, the cause therefore went to the circuit court **with the petitions for appoint-**

ment of a receiver still pending and undetermined." (Emphasis ours.)

[fol. 48] (B)

Furthermore, it should be noted that in the Central Illinois Public Service Co. case, supra, there was involved the question of whether, as the statute required, the suit there had been by writ of certiorari "commenced within twenty days of the receipt of notice of the decision of the board." The opinion discloses that the decision of the Board had been rendered on August 10, 1918; that the praecipe for writ of certiorari had been filed on August 26, 1918, in the Circuit Court of Coles County, which Court, the opinion rules, was without jurisdiction of the subject matter of the suit or of the administrator party; that the change of venue under the Venue Act was not applied for until May 3, 1919, many months after the decision of the Board, and that thereafter the change of venue was granted and the transcript on change of venue filed in the Circuit Court of Champaign County. This Court there held that the suit was "commenced" within twenty days after the decision of the Board, *and when the proceeding was instituted by the filing of the praecipe for writ of certiorari in the Circuit Court of Coles County (which had no jurisdiction to hear and determine the merits of the suit)*, notwithstanding that the change of venue to the Circuit Court of Champaign County (which had jurisdiction to hear and determine the merits of the suit) did not take place until some months thereafter. It necessarily follows from that decision that it should be ruled in the case at bar that plaintiff's suit was "commenced within two years from the day the cause of action accrued," and when the proceedings were instituted in the City Court of East St. Louis, rather than when [fol. 49] the change of venue to the Circuit Court of St. Clair County took place under the provisions of the Venue Act.

III

This Honorable Court, in rendering its opinion and decision in this case, has overlooked, misconceived or misapprehended the effect of sustaining the plaintiff's position in this case.

On page 5 of the printed opinion in the Herb v. Pitcairn case the Court said:

> "When the present suit was filed in the city court of Granite City the defendants could have disregarded the summons, and judgment rendered in such court would have been without effect and no justification for seizing defendants' property on execution. Yet, if appellant's contention is sustained, a valid judgment could be obtained by transferring the cause to the proper court upon a summons or notice that defendants could safely disregard when served upon them. This would give the order of transfer by the city court the effect of vitalizing process that was void and **considering a case commenced and pending in a proper court during a period when, in legal contemplation, no judicial control of defendants had yet been exercised.**" (Emphasis ours.)

This quotation indicates that this Honorable Court conceives it to be necessary to the "commencement" and "pendency" of a suit that the Court in which the proceeding was instituted should have jurisdiction over the person of the defendant. Ordinarily, and in the absence of statutory restrictions, whether a suit is "commenced" or "pending" does not depend upon service of process upon the de- [fol. 50] fendant, or the existence of jurisdiction over him (see 1 Corpus Juris Secundum, pp. 1396-1397, § 129), and in Illinois the only requirement for the commencement of an action or suit is the filing of the complaint (see Illinois Revised Statutes 1941, chap. 110, par. 129). So, even if the summons issued out of the City Court in the case at bar could have been disregarded by defendant, and even if it should be necessary that a new summons or notice be issued out of the Circuit Court to which the venue had been changed, and served upon defendant, in order for plaintiff to secure the rendition of a valid judgment against defendant, the fact that such summons had not been issued and served would not alter the fact that plaintiff's suit had been "commenced" in the City Court, and thereafter remained "pending." That is to say, plaintiff's suit had been "commenced" within the time required by the Federal Act, and thereafter remained "pending," even though

the City Court, and the Circuit Court to which the venue of the suit was changed under the Venue Act, had not acquired jurisdiction over the person of the defendant.

In view of the fact that this Court has overlooked, misconceived or misapprehended the matters above pointed out, we urge that a rehearing should be granted, and that on such rehearing the judgment of the Circuit Court should be reversed, and this cause remanded for further proceedings.

Respectfully submitted, McGlynn & McGlynn, Mark D. Eagleton, Roberts P. Elam, Attorneys for Appellant.

[fol. 11] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the eighth day of November in the year of our Lord, one thousand nine hundred and forty-three, within and for the State of Illinois.

Present: June C. Smith, Chief Justice; Justice Clyde E. Stone, Justice Walter T. Gunn, Justice William J. Fulton, Justice Francis S. Wilson, Justice Loren E. Murphy, Justice Charles H. Thompson; George F. Barrett, Attorney General; Warren C. Murray, Marshal.

Attest: Edward F. Cullinane, Clerk pro tempore.

Be it remembered, that, to-wit: on the 12th day of November, A. D. 1943, the same being one of the days of the term of Court aforesaid, certain proceedings were had in said Court and entered of record in the words and figures following, to-wit:

No. 27276

BENJAMIN F. BELCHER, Appellant,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Corporation, Appellee

Appeal, Circuit Court, St. Clair County

ORDER

And now on this day, the Court having duly considered the petition for rehearing filed by appellant in the above entitled cause, and the Court being fully advised in the premises,

It Is Ordered that the petition for rehearing be, and the petition for rehearing is hereby denied.

[fol. 12] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the eighth day of November in the year of our Lord, one thousand nine hundred and forty-three, within and for the State of Illinois.

Present: June C. Smith, Chief Justice; Justice Clyde E. Stone, Justice Walter T. Gunn, Justice William J. Fulton, Justice Francis S. Wilson, Justice Loren E. Murphy, Justice Charles H. Thompson; George F. Barrett, Attorney General; Warren C. Murray, Marshal.

Attest: Edward F. Cullinane, Clerk pro tempore.

Be it remembered, that, to-wit: on the 19th day of November, A. D. 1943, the same being one of the days of the term of Court aforesaid, certain proceedings were had in said Court and entered of record in the words and figures following, to-wit:

No. 27276

BENJAMIN F. BELCHER, Appellant,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, a Corporation, Appellee

Appeal, Circuit Court, St. Clair County

ORDER

Now on this day the Court having duly considered the motion by appellant to stay the mandate for a period of ninety days, and the Court being fully advised in the premises,

It Is Ordered that the mandate in the above entitled case be, and the mandate is hereby stayed for a period of ninety days.

[fol. 13] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

I, Edward F. Cullinane, Clerk pro tempore of the Supreme Court of the State of Illinois, and keeper of the records and seal thereof, do hereby certify the foregoing to be a true copy of

1. abstract of record filed April 20, 1943
2. order of submission entered May 20, 1943
3. opinion filed September 24, 1943
4. mandate
5. petition for rehearing filed October 19, 1943
6. order denying petition for rehearing entered November 12, 1943
7. order staying mandate for a period of ninety days entered November 19, 1943.

in a certain cause entitled in this Court

No. 27276

BELCHER, Appellant,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, a Corporation, Appellee

Appeal, Circuit Court, St. Clair County

Witness: my hand and seal of said Supreme Court, in Springfield, in said State, this first day of December A. D. 1943.

Edward F. Cullinane, Clerk pro tempore. (Seal.)

[fol. 54] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 27, 1944

The petition herein for a writ of certiorari to the Supreme Court of the State of Illinois is granted, and the case is consolidated with No. 681 for argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. [redacted] 2[illegible]

VICTOR J. HERB,

Petitioner,

vs.

NORMAN B. PITCAIRN AND FRANK C. NICODEMUS, JR., RECEIVERS FOR WABASH RAILWAY COMPANY, A CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

ROBERTS P. ELAM,
Counsel for Petitioner.

MARK D. EAGLETON,
JOSEPH B. MCGLYNN,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 681

VICTOR J. HERB,

Petitioner,

vs.

NORMAN B. PITCAIRN AND FRANK C. NICODEMUS, JR., RECEIVERS FOR WABASH RAILWAY COMPANY, A CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Now comes Victor J. Herb, petitioner, and respectfully petitions this Honorable Court to grant a writ of certiorari to the Supreme Court of the State of Illinois, and to remove therefrom to this Court for review, the record in the case lately pending in said Supreme Court of the State of Illinois, styled Victor J. Herb, plaintiff-appellant, vs. Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers for Wabash Railway Company, a corporation,

defendants-appellees, being cause No. 27,275 on the docket of said Supreme Court of the State of Illinois.

The duly certified record, including all the proceedings in the City Court of Granite City, Illinois, wherein said cause was instituted, in the Circuit Court of Madison County, Illinois, to which the venue of said cause was changed and in which judgment was entered, and in the Supreme Court of the State of Illinois, to which an appeal was taken by said Victor J. Herb from the judgment of the trial court, is filed herewith under separate cover.

Your petitioner represents that he is aggrieved by the judgment of the Supreme Court of the State of Illinois entered in said cause, wherein the said Supreme Court of Illinois affirmed the judgment of the trial court, and on the 12th day of November, 1943, thereafter, denied this petitioner's petition for a rehearing of said cause, and entered a final judgment affirming the judgment of the trial court.

Your petitioner states that the matters of issue in said cause are of a Federal nature and are of peculiar gravity and importance, in that said suit was brought under the Federal Employers' Liability Act to recover damages for personal injuries sustained by this petitioner on November 23, 1936, as a result of the violation of the Federal Safety Appliance Act by the respondents Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers for Wabash Railway Company, a corporation, and in that the decision of the Supreme Court of the State of Illinois, complained of, is in conflict with the applicable decisions of this Honorable Court upon the questions involved, and the principles announced by this Court in those decisions.

Summary and Short Statement of the Matter Involved.

On December 22, 1937, this petitioner, as plaintiff, filed in the City Court of Granite City, Illinois, his complaint

against the respondents, as defendants (R. 12), stating a cause of action against said respondents under the Federal Employers' Liability Act (U. S. C. [1934 Ed.] Title 45, §§ 51-59) for injuries sustained by this petitioner in or near the City of Decatur, Illinois, on the 23rd day of November, 1936 (R. 9), by reason of an alleged violation by respondents of the provisions of the Federal Safety Appliance Act (U. S. C. [1934 Ed.] Title 45, §§ 1-16) relating to hand brakes. Summons was duly issued and served upon the respondents (R. 12).

Thereafter, on February 28, 1938, the respondents filed in said City Court of Granite City, Illinois, their answer (R. 12-18) by way of denial of various of the allegations of the complaint, coupled with a plea of assumption of risk.

Thereafter, on March 5, 1938, petitioner duly filed in said City Court of Granite City, Illinois, his reply to said answer (R. 18).

Thereafter, on October 13, 14 and 15, 1938, the case was duly tried to a jury in the said City Court of Granite City, Illinois (R. 2-3), resulting in a verdict in favor of this petitioner, as plaintiff, and against respondents, as defendants, in the sum of $30,000.00 (R. 3, 19), but thereafter this verdict was set aside and a judgment entered for respondents (defendants) non obstante veredicto (R. 4). This petitioner duly appealed from the judgment non obstante veredicto (R. 4-5, 19; cf. *Herb* v. *Pitcairn*, 306 Ill. App. 583, 29 N. E. 2d 543, and *Herb* v. *Pitcairn*, 377 Ill. 405, 36 N. E. 2d 555). As a result of that appeal, the judgment entered non obstante veredicto was reversed, and the cause was remanded to the City Court of Granite City, Illinois, for further proceedings (R. 19-21).

Thereafter, and after the action had been re-docketed in the City Court of Granite City, Illinois (R. 23-24), the Supreme Court of Illinois decided the cases of *Wemer* v. *Illi-*

nois Central Railroad Co., 379 Ill. 559, 42 N. E. 2d 82, and *Mitchell* v. *Louisville & N. R. Co.*, 379 Ill. 522, 42 N. E. 2d 86, ruling, in substance and effect, that each of the various City Courts in Illinois was without jurisdiction to hear and determine the subject matter of any action involving a cause of action which arose outside the territorial limits of the City in which the particular City Court was located. Accordingly, this petitioner thereafter filed in the City Court of Granite City, Illinois, a motion for a change of venue in this action to the Circuit Court of Madison County, Illinois, under the provisions of Chapter 146, Section 36, Illinois Revised Statutes, 1941, because the action had been commenced in the wrong court—that is, in a court which, under the decisions in *Werner* v. *Illinois Central Railroad Co.*, *supra*, and *Mitchell* v. *Louisville & N. R. Co.*, *supra*, was without jurisdiction to hear and determine the subject matter of petitioner's action, because the cause of action had arisen outside the territorial limits of Granite City, Illinois (R. 24-25). Petitioner's motion for a change of venue was, on July 17, 1942, sustained by the said City Court of Granite City, Illinois, and the venue of said action was duly ordered changed to the Circuit Court of Madison County, Illinois (R. 5-6). On July 31, 1942, the pleadings, papers, documents and exhibits, and a duly certified transcript of all the orders, in said cause in the said City Court of Granite City, Illinois, were duly filed in the said Circuit Court of Madison County, Illinois, on change of venue (R. 1-7).

Thereafter, on August 21, 1942, the respondents (defendants) filed in the Circuit Court of Madison County, Illinois, their motion to dismiss petitioner's (plaintiff's) cause (R. 26-30). That motion to dismiss was based, substantially, upon the grounds that, because the said City Court of Granite City, Illinois, was without jurisdiction to hear and determine the subject matter (merits) of plaintiff's action,

(a) all orders entered, and all proceedings had, in said City Court of Granite City, Illinois, including the order changing the venue in said action to the said Circuit Court of Madison County, were null, void and of no effect, (b) if the statute under which the change of venue was granted (Chapter 146, Section 36, Illinois Revised Statutes, 1941) authorizes a City Court to change the venue of an action, of which it is without jurisdiction to hear and determine the merits, to a court properly having jurisdiction to hear and determine the action, then such statute is contrary to Section 1, Article VI of the Constitution of Illinois, and is null and void, and (c) such statute, if it authorizes a change of venue under such circumstances, is in conflict with Section 6 of the Federal Employers' Liability Act (U. S. C. [1934 Ed.] Title 45, § 56), and is null and void.

This motion of respondents (defendants), to dismiss, was by the said Circuit Court of Madison County, Illinois, sustained on November 27, 1942, and judgment of dismissal was then entered accordingly (R. 30-31). From that order and judgment, petitioner (plaintiff) duly appealed to the Supreme Court of the State of Illinois (R. 32-33), where the judgment of the Circuit Court of Madison County, Illinois, was, on September 24, 1943, affirmed (R. 35-44).

This petitioner, in due time, filed in the said Supreme Court of Illinois his petition for a rehearing (R. 45-56), which was entertained, but on the 12th day of November, 1943, the said Supreme Court of Illinois denied said petition for a rehearing (R. 57). The said Supreme Court of Illinois having denied petitioner's petition for rehearing on said date, the judgment of said Court thereupon became final.

Opinions of the Courts Below.

There was no opinion of the trial court in the case here sought to be reviewed.

The opinion of the Supreme Court of the State of Illinois appears at pages 35-43, inclusive, of the printed transcript of the record herewith filed. It is reported as *Herb* v. *Pitcairn, et al.*, 384 Ill. 237, 51 N. E. 2d 277.

Jurisdiction of this Court.

1.

Jurisdiction of this Court is based upon the Judicial Code, Section 237, as amended by the Act of February 13, 1925, 43 Stat. 937, U. S. Code, Title 28, Section 344, paragraph (b) permitting petitions for certiorari to be prayed for and issued to the highest courts of the various states where a title, right, privilege or immunity is specially set up or claimed under a statute of the United States.

The action here sought to be reviewed having been based upon the Federal Employers' Liability Act (Act of Apr. 22, 1908, c. 149, 35 Stat. 65, as amended by Act of Apr. 5, 1910, c. 143, 36 Stat. 291; U. S. C. [1934 Ed.] Title 45, §§ 51-59), and the Federal Safety Appliance Act (Act of Mar. 2, 1893, c. 196, 29 Stat. 531, as amended by Act of Mar. 2, 1903, c. 976, 32 Stat. 943 and Act of Apr. 14, 1910, c. 160, 36 Stat. 298; U. S. C. [1934 Ed.] Title 45, §§ 1-16), the jurisdiction of this Court attaches because the Supreme Court of Illinois, in affirming the judgment of the trial court, has decided a Federal question of substance in a way probably not in accord with the applicable and controlling principles and decisions of this Court. Some authorities sustaining the jurisdiction are:

Seaboard Air Line R. Co. v. *Horton*, 233 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062;

Minneapolis, St. P. & S. S. M. R. Co. v. *Gotcan*, 269 U. S. 406, 46 S. Ct. 129, 70 L. Ed. 335.

Gulf M. & N. R. Co. v. *Wells*, 275 U. S. 455, 48 S. Ct. 151, 72 L. Ed. 370;
Atlantic Coast Line R. Co. v. *Davis*, 279 U. S. 34, 49 S. Ct. 210, 73 L. Ed. 601.

2.

The Supreme Court of Illinois is the highest court of that State.

The original date of the judgment of the Supreme Court of Illinois here sought to be reviewed is September 24, 1943.

Petitioner's motion for a rehearing was filed October 19, 1943, within the time provided by the rules of the Supreme Court of Illinois, and said petition for rehearing was denied November 12, 1943.

Questions Presented.

Only one basic question is raised in this Court on this record, viz: Whether an action under the Federal Employers' Liability Act, instituted within two years from the day the cause of action accrued, in a State court which was without jurisdiction to hear and determine the merits of the action but which had a limited jurisdiction to change the venue of such action to a court having complete jurisdiction thereof, the venue of which action was changed to such latter court more than two years after the cause of action accrued, is "commenced within two years from the day the cause of action accrued" as required by Section 6 of the Federal Employers' Liability Act (Act of Apr. 22, 1908, c. 149, § 6, 35 Stat. 66, as amended by Act of Apr. 5, 1910, c. 143, § 1, 36 Stat. 291; U. S. C. [1934 Ed.] Title 45, § 56).

Subsidiary to this main question, there is the question of whether Section 6 of the Federal Employers' Liability Act requires suits brought under that Act in State courts to be commenced in a State court which has full and complete jurisdiction over the action.

Summary of Reasons for Allowance of Writ.

I.

In this case the Supreme Court of Illinois has decided a Federal question of substance, not heretofore determined by this Court upon a like statement of facts, in a way probably not in accord with the applicable and controlling principles and decisions of this Court.

The question is one of a general nature, involving the rights and affecting the interests of an extensive class of employees of interstate carriers by railroad, and involving the rights and liabilities of such carriers.

II.

The Supreme Court of Illinois has erroneously ruled that

(a) Recovery under the Federal Employers' Liability Act is conditioned not only upon commencing an action within two years from the date of the injury, but also upon commencing such action within such time in a Court having jurisdiction to hear and determine the same—that is, that it is not enough for the action to be commenced in a Court having a limited jurisdiction over the action, but it must be commenced in a Court having full and complete jurisdiction.

(b) Where an action under the Federal Employers' Liability Act is instituted, within two years from the day the cause of action accrued, in a State court which was without jurisdiction to hear and determine the merits of the action but which had a limited jurisdiction to change the venue of such action to a court having complete jurisdiction thereover, the action is not "commenced within two years from the day the cause of action accrued" as required by Section 6 of the Federal Employers' Liability Act, if the

change of venue to the latter court takes place more than two years after the day the cause of action accrued.

III.

The opinions and decisions of this Court, as well as those of other Federal courts hold that

(a) The Federal Employers' Liability Act is a remedial act which should be construed liberally so as to prevent the mischief and advance the remedy.

(b) The State courts, where their jurisdiction is appropriate, have concurrent jurisdiction with the Federal courts over actions under the Federal Employers' Liability Act.

(c) Where an action under the Federal Employers' Liability Act is brought in a State court, that court not only can, but must, exercise such jurisdiction as it may have over the action.

(d) An action or suit is commenced when a party puts in motion, under his claim, the instruments or process of a court of justice.

It follows that, under the controlling decisions of this Court, where (as here) an action under the Federal Employers' Liability Act is instituted, within two years from the day the cause of action accrued, in a State court which is without jurisdiction to hear and determine the merits of the action but which has a limited jurisdiction to change the venue of such action to a court having complete jurisdiction thereof, the action is "commenced within two years from the day the cause of action accrued" as required by Section 6 of the Federal Employers' Liability Act, notwithstanding that the change of venue to the latter court actually took place more than two years after the cause of action accrued.

Prayer.

For the purpose of correcting the errors complained of, and to the end that the rights of the petitioner may be determined in accordance with the Federal law, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court, directed to the Supreme Court of the State of Illinois, commanding it to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and proceedings of the said Supreme Court of Illinois in the within described cause of Victor J. Herb, plaintiff-appellant, *vs.* Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers for Wabash Railway Company, a corporation, defendants-appellees, No. 27,275, to the end that the judgment of said Supreme Court of Illinois in said cause may be reviewed by this Court, as provided by law, and that your petitioner may have such other relief as to this Court may seem appropriate, and that the judgment of said Supreme Court of Illinois may be reversed by this Honorable Court.

VICTOR J. HERB,
Petitioner.
By ROBERTS P. ELAM,
Counsel for Petitioner.

MARK D. EAGLETON and
JOSEPH B. MCGLYNN,
Of Counsel.

SUPPORTING BRIEF.

I.

Under the law of Illinois, where (as here) a suit, action or proceeding is commenced in a court of record, but in the wrong court because that court lacks jurisdiction over the parties or the subject matter, or both, the court nevertheless has a limited jurisdiction to change the venue to a proper court, and any of the parties is entitled, upon motion, to such a change of venue, irrespective of whether such motion is made before or after trial; and the taking of such a change of venue does not constitute a commencement of a new action in the court to which the venue is changed, but constitutes merely one step or proceeding in the prosecution of the action commenced in the court from which the venue is changed.

Illinois Revised Statutes 1941, Chap. 146, § 36;
Illinois Revised Statutes 1941, Chap. 146, §§ 15, 16;
Illinois Revised Statutes 1941, Chap. 37, § 346;
Central Illinois Public Service Co. v. *Industrial Commission*, 293 Ill. 62, 127 N. E. 80;
Gill v. *Lynch*, 367 Ill. 203, 10 N. E. 2d 812.

II.

Petitioner's action was "commenced" within two years from the day his cause of action accrued, as required by Section 6 of the Federal Employers' Liability Act.

A. The question of when a suit is commenced in a State court is a matter which the Federal courts recognize as being controlled generally by the practice in the particular State.

Goldenburg v. *Murphy*, 108 U. S. 162, 2 S. Ct. 388, 27 L. Ed. 686;

Chesapeake & O. R. Co. v. *De Atley*, 241 U. S. 310, 36 S. Ct. 564, 60 L. Ed. 1016;

Minneapolis & St. L. R. Co. v. *Bombolis*, 241 U. S. 211, 36 S. Ct. 595, 60 L. Ed. 961;

Act of April 8, 1908, c. 149, § 6, 35 Stat. 66, as amended by Act of April 5, 1910, c. 143, § 1, 36 Stat. 291; U. S. C. [1934 Ed.], Title 45, § 56.

B. Petitioner's action was commenced on the day his complaint was filed in the City Court of Granite City, Illinois.

Illinois Revised Statutes 1937, Chap. 110, § 129;

Milwaukee Mechanics Ins. Co. v. *Schallman*, 188 Ill. 213, 59 N. E. 12;

Randall Dairy Co. v. *Pevely Dairy Co.*, 278 Ill. App. 350;

Cohens v. *Virginia*, 6 Wheat. [19 U. S.] 264, 5 L. Ed. 257;

Illinois Revised Statutes 1941, Chap. 110, § 129.

C. The change of venue in petitioner's action from the City Court of Granite City to the Circuit Court of Madison County, which took place more than two years after the cause of action accrued, does not affect the fact that such action was commenced in the City Court within the two-year period.

Authorities Cited, *supra*.

III.

In ruling that recovery under the Federal Employers' Liability Act was conditioned not only upon the commencing of an action within two years from the day the cause of action accrued, but also upon commencing such action in a court having jurisdiction to hear and determine the same, the decision of the Supreme Court of Illinois in this case

has construed Section 6 of that Act in such a way as to not require a State court to exercise its jurisdiction over an action under the Act, and to discriminate between rights arising under that Act and rights arising under State laws, contrary to principles announced by this Court.

A. The Act does not expressly or impliedly make any such requirement as to the character of the power of the court in which the action is brought.

Act of April 8, 1908, c. 149, § 6, 35 Stat. 66, as amended by Act of April 5, 1910, c. 143, § 1, 36 Stat. 291; U. S. C. [1934 Ed.], Title 45, § 56.

B. The Act, being a remedial one, is to be liberally construed so as to advance the remedy proposed and correct the evils against which it was directed.

Jamison v. *Encarnacion*, 281 U. S. 635, 50 S. Ct. 440, 74 L. Ed. 1082.

C. A State court having jurisdiction over an action under the Act not only can, but must, exercise such jurisdiction.

Second Employers' Liability Cases [*Mondou* v. *New York, N. H. & H. R. Co.*], 223 U. S. 1, 32 S. Ct. 169, 56 L. Ed. 327;

McKnett v. *St. Louis & S. F. R. Co.*, 292 U. S. 230, 54 S. Ct. 690, 78 L. Ed. 1227;

Miles v. *Illinois Central R. Co.*, 315 U. S. 698, 62 S. Ct. 827, 86 L. Ed. —.

D. A State may not discriminate against rights arising under Federal laws.

McKnett v. *St. Louis & S. F. R. Co.*, *supra*.

ARGUMENT.

I.

Some prefatory discussion of several phases of Illinois law is necessary to a comprehensive understanding of the particular questions here involved.

The Circuit Courts in Illinois are courts of general original jurisdiction in civil cases (Constitution of Illinois of 1870, Art. VI, § 12).

The City Courts in that State are courts of record (Illinois Revised Statutes 1941, Chap. 37, § 333; *East St. Louis Connecting Ry. Co.* v. *Enright*, 47 Ill. App. 494). That such City Courts were courts of general jurisdiction in civil cases, having concurrent jurisdiction with the Circuit Courts within the City in such cases, for many years had been assumed (*cf. Helmuth* v. *Bell* [1894], 150 Ill. 263, 37 N. E. 230; *Herb* v. *Pitcairn* [1941], 377 Ill. 405, 36 N. E. 2d 555), and on occasions expressly declared (*Baker* v. *Rockabrand*, 118 Ill. 365, 371, 8 N. E. 456; *Miller* v. *People*, 183 Ill. 423, 426, 56 N. E. 60; *Smith* v. *Herdlicka*, 323 Ill. 585, 590, 154 N. E. 414; *Knickerbocker Ice Co.* v. *Leyda*, 128 Ill. App. 66, 69; *Konow* v. *Nichols*, 128 Ill. App. 409, 413; *Torpedo Top Co.* v. *Royal Ins. Co.*, 162 Ill. App. 338, 340-341; *Swanson* v. *Malm*, *R. I. & E. Trac. Co.*, 204 Ill. App. 144, 156-146; *Buchanan* v. *Scottish Union & Nat'l Ins. Co.*, 210 Ill. App. 523, 525). However, on March 16, 1942, in the cases of *Werner* v. *Illinois Central R. Co.*, 379 Ill. 559, 42 N. E. 2d 82, and *Mitchell* v. *Louisville & N. R. Co.*, 379 Ill. 522, 42 N. E. 2d 86, the Supreme Court of Illinois ruled, in substance and effect, that each of the City Courts in that State was without jurisdiction to hear and determine the subject matter of any action involving a cause of action arising outside the territorial limits of the City in which such court was located.

The Illinois statutes relating to the mechanics of a change

of venue from one court to another are typical of such statutes generally. Illinois Revised Statutes 1941, Chap. 146, § 15, in so far as here relevant, provides:

> "In all cases of change of venue, the clerk of the court from which the change is granted shall immediately make out a full transcript of record and proceedings in the case, and of the petition, affidavits and order for the change of venue, and transmit the same, together with all the papers filed in the case, to the proper court: * * *. Such transcript and papers or copies may be transmitted by mail, or in such other way as the court or judge may direct."

while § 16 of that same chapter of the Illinois statutes further provides:

> "The clerk of the court to which the change of venue is granted shall file the transcript and papers transmitted to him and docket the cause, and such cause shall be proceeded in and determined in all things, as well before as after judgment, *as if it had originated in such court.*" (Emphasis supplied.)

With respect to changes of venue from the City Courts, Illinois Revised Statutes 1941, Chap. 37, § 346, in so far as here relevant, provides:

> "Change of venue from city courts, *for the same causes* and in the same manner, may be taken as from circuit courts, and the cases sent to any other city court, or to any circuit court, or to any other court of competent jurisdiction where the cause complained of does not exist." (Emphasis suppplied.)

A remarkable statute upon change of venue is Illinois Revised Statutes 1941, Chap. 146, § 36 (sometimes referred to as the "Illinois Venue Act" or the "Venue Act of 1891"), which provides:

> "That wherever any suit or proceeding shall hereafter be commenced, in any court of record in this

State, and it shall appear to the court where the same is pending, that the same has been commenced in the wrong court or county, then upon motion of either or any of the parties to suit or proceeding, the court shall change the venue of such suit or proceeding to the proper court or county, and the same when the venue shall be so changed, shall be then pending and triable in such court or county to which the same shall be so changed the same as in other cases of change of venue: *Provided*, that where either party to such suit or proceeding shall procure the change of venue as herein provided for, that the court shall require the plaintiff in said suit to pay all costs in such suit or proceeding, up to and including the costs of the change of venue except such costs, if any there are, as shall have been made or occasioned by answer to the merits and a trial thereon, if any such shall have been had or made, and such costs, if any, caused by answer to the merits and trial thereon shall abide the final result of such suit or proceeding the same as in other cases of change of venue."

This last quoted statute was construed and applied by the Supreme Court of Illinois in *Central Illinois Public Service Co.* v. *Industrial Comm.*, 293 Ill. 62, 127 N. E. 80. That case involved a certiorari proceeding to review an award of the Illinois Industrial Commission under a statute which required that such proceeding be "commenced" within twenty days after the decision of the Industrial Commission and in the Circuit Court of the County in which the defendant might be found. B. L. Kirk, the administrator of the deceased employee, was the defendant, and lived and could be found only in Champaign County. Despite this, the certiorari proceeding was commenced in the Circuit Court of Coles County, but within the statutory period. Kirk was served with notice by mail as provided by the statute, but entered only a special appearance to contest the jurisdiction of the Circuit Court of Coles County. Vari-

ous proceedings in the case were had, and, some six months after the action had been commenced, a motion was filed by the plaintiff, under the Illinois Venue Act (now Illinois Revised Statutes 1941, Chap. 146, § 36), for a change of venue to the Circuit Court of Champaign County. This motion for change of venue was granted on the same day it was filed, and the mechanics of the change of venue were completed. Kirk then entered his special appearance in the Circuit Court of Champaign County and moved to quash the writ of certiorari upon the grounds that the proceeding had not been commenced within the time limited by statute, that the Circuit Court of Coles County never acquired jurisdiction, and that the Circuit Court of Champaign County, therefore, never acquired jurisdiction upon the change of venue being made. The trial court sustained this motion and dismissed the writ of certiorari. On appeal from this ruling, the Supreme Court of Illinois said:

> "* * * the circuit court of Coles county did not have jurisdiction either of the person of the administrator or the subject matter of the suit" (127 N. E., l. c. 82),

but in reversing the ruling of the trial court, in holding that the case properly had been commenced and transferred to the Circuit Court of Champaign County on change of venue, and in remanding the case for a trial upon the merits in that court, the Supreme Court of Illinois said (127 N. E., l. c. 82):

> "* * * it is evident that by the use of the term 'commenced in the wrong court or county,' *the Legislature intended to reach those cases begun in courts not having jurisdiction of the subject-matter* as well as those where jurisdiction of the parties, alone, is lacking. This is a provision of the law evidently enacted for the purpose of simplifying procedure and preventing the loss of substantial rights through a misunder-

standing as to what forum should be used to obtain such rights. *By this act it is evident that the Legislature intended to and did confer on all courts of record in this state, without regard to any other jurisdiction either conferred upon or denied it by common law or statute, jurisdiction to 'change the venue of such suit or proceeding to the proper court or county.'* It cannot be doubted that the power to confer that limited jurisdiction lies within the powers of the Legislature, and we are of the opinion that in the instant case, while the circuit court of Coles county had no jurisdiction of the subject-matter involved for any other purpose than that defined in the Venue Act of 1891 and could therefore enter no order affecting the rights of the parties under the award made, that court was by said act empowered to transfer the cause to the proper county, which in this case was Champaign county, and under said act when said transfer was made the cause was from that time forward pending in the circuit court of Champaign county." (Emphasis supplied.)

The above quoted decision was cited and applied in *Gill v. Lynch*, 367 Ill. 203, 10 N. E. 2d 812, and, so far as we can determine, has never been modified nor weakened in the slightest degree.

From the foregoing statutes and authorities it appears that, under the law of Illinois:

(a) Irrespective of any other jurisdiction conferred upon or denied it, every court of record in Illinois — including the various City Courts — has a limited jurisdiction over every suit or proceeding commenced or pending therein, empowering such court upon application of any party to change the venue of such suit or proceeding to the proper court or county.

(b) The institution of a suit or proceeding in a court of record within the time required by law, even though the suit or proceeding be instituted in a court which does not have jurisdiction over the parties defendant or the subject matter of the suit, or both, constitutes the "commencement" of the action within the time re-

quired by law, by reason of the limited jurisdiction of the court to transfer the cause to the proper court or county by a change of venue.

(c) The matter of effecting a change of venue of a suit under the Illinois Venue Act, from a court of record which is without full jurisdiction (i. e., the "wrong court") to a court which has full jurisdiction (i. e., the "proper court") does not constitute the "commencement" of the action in the latter court, but constitutes merely one of the proceedings in the prosecution of the action which was "commenced" in the former court.

To further summarize: It appears to be established under the law of Illinois that, where a suit or proceeding is commenced in a court of record in that State, but in the wrong court because that court lacks jurisdiction over the parties or the subject matter, or both, any of the parties is entitled, upon motion, to a change of venue of the action to a proper court, irrespective of whether such motion is made before or after trial; and the taking of such a change of venue does not constitute a commencement of the action in the court to which the transfer is made, but constitutes merely one step or proceeding in the prosecution of the action deemed "commenced" in the court from which the transfer is taken.

II.

In view of the well-settled doctrines, that in actions brought in a State court the Federal Courts will follow the practice of the State in determining when an action is commenced (*Goldenberg* v. *Murphy*, 108 U. S. 162, 2 S. Ct. 388, 27 L. Ed. 686), and that the practice and procedure in actions brought under the Federal Employers' Liability Act in a State court will be governed by the law of the State in which such court is located (*Chesapeake & O. R. Co.* v. *De Atley*, 241 U. S. 310, 317, 36 S. Ct. 564, 60 L. Ed. 1016; *Minneapolis & St. L. R. Co.* v. *Bombolis*, 241 U. S. 211, 36

S. Ct. 595, 60 L. Ed. 961), there can be little room for doubt about the applicability of the Illinois doctrines which we have just above discussed in determining whether the case at bar was "commenced" within the time required by Section 6 of the Federal Employers' Liability Act (Act of April 8, 1908, c. 149, § 6, 35 Stat. 66, as amended by the Act of April 5, 1910, c. 143, § 1, 36 Stat. 291; U. S. C. [1934 Ed.], Title 45, § 56), which, in so far as here relevant, provides:

> "No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued * * *. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States, * * *."

This petitioner's cause of action accrued at Decatur, Illinois, on the date of his injury, November 23, 1936 (R. 8-9, 13). On December 22, 1937, as plaintiff he filed in the City Court of Granite City, Illinois, his complaint alleging a cause of action under the Federal Employers' Liability Act (R. 7-12), and had a summons issued out of that court for the defendants (R. 12). Thus, his action was "commenced" in December, 1937, well within "two years from the day the cause of action accrued" whether his action be said to be "commenced" when the process (summons) was issued, as was the rule at common law and under the Illinois Civil Practice Act prior to its amendment on July 6, 1937 (*Cohens v. Virginia*, 6 Wheat. [19 U. S.] 264, 408, 5 L. Ed. 257, 292; Illinois Revised Statutes 1937, Chap. 110, § 129; *Milwaukee Mechanics Ins. Co.* v. *Schallman*, 188 Ill. 213, 220, 59 N. E. 12; *Randall Dairy Co.* v. *Peccly Dairy Co.*, 278 Ill. App. 350, 351), or when the complaint was filed, as is the rule under the Illinois Civil Practice Act since its amendment in 1937 (Illinois Revised Statutes 1941, Chap. 110, § 129). Thereafter, this petitioner prosecuted his action with due dili-

gence, and it was due only to the decisions of the Illinois Supreme Court, over four years later, in *Werner* v. *Illinois Central R. Co.*, *supra*, and *Mitchell* v. *Louisville & N. R. Co.*, *supra*, that the jurisdiction of the City Court of Granite City over his action was determined to be limited, so as to require a change of venue to the Circuit Court of Madison County. Effecting that change of venue did not, under the applicable Illinois law, constitute a dismissal of petitioner's action in the City Court of Granite City and the commencement of his action in the Circuit Court of Madison County, but, on the contrary, constituted merely another step or proceeding in the prosecution of his action which was commenced in the City Court and transferred to the Circuit Court. The City Court of Granite City was not wholly without jurisdiction of petitioner's action, although its jurisdiction over his action was a limited one—limited to the granting of a change of venue to a court having full jurisdiction. The fact that such change of venue took place more than two years after the day petitioner's cause of action accrued is immaterial in determining whether his action was "commenced" within two years from the day the cause of action accrued.

III.

The Supreme Court of Illinois, notwithstanding the matters hereinbefore discussed, ruled that this action by petitioner was not commenced within two years after the cause of action accrued, and based such ruling upon its interpretation of Section 6 of the Federal Employers' Liability Act as follows (R. 38-39; 51 N. E. 2d, l. c. 280):

> "* * * we observe recovery under the Federal Employers' Liability Act is conditioned upon two things: (1) commencing an action within two years from the date of the injury; and (2) *commencing such action in a court having jurisdiction to hear and determine the*

> *same.* * * * The plaintiff having predicated his case upon the Federal Employers' Liability Act must comply with its provisions, both with respect to the time of commencing the suit *and of bringing it in a court having jurisdiction to hear and determine it.*" (Emphasis supplied)

We submit that Section 6 of the Liability Act does not require that actions thereunder, in order to comply with the requirement relating to the time within which they must be commenced, must be brought within that time in a court having jurisdiction to hear and determine the merits of the action—that is to say, full and complete jurisdiction over the cause. There is no specific language in that section of the Act making, or even suggesting, any such requirement as to the character of the power of the Court in which the action is brought, and so far as we have been able to determine neither this Court nor any other Federal court has interpreted this section to contain such a requirement.

On the contrary, the implications from the decisions of this Court construing this Act clearly indicate that this section should not be so narrowly construed as the Supreme Court of Illinois has construed it. The Act is a remedial one, and, like all remedial legislation, should be liberally construed so as to advance the remedy proposed and correct the evils against which it was directed (*Jamison* v. *Encarnacion*, 281 U. S. 635, 640, 50 S. Ct. 440, 74 L. Ed. 1082). Section 6 of the Act does not vest in the State courts concurrent jurisdiction with the Federal courts over actions under the Act, but, conversely, vests in the Federal courts "concurrent jurisdiction with that of the courts of the several States" over such actions. It is familiar doctrine that, in the absence of a constitutional or a statutory restriction of jurisdiction over an action or proceeding to the Federal courts or tribunals, the courts of the several States have jurisdiction to enforce rights arising under the Constitu-

tion and laws of the United States (*Cohens* v. *Virginia*, 6 Wheat. [19 U. S.] 264, 396-397, 5 L. Ed. 257; *Claflin* v. *Houseman*, 93 U. S. 130, 136, 23 L. Ed. 833; *Robb* v. *Connolly*, 111 U. S. 624, 637, 4 S. Ct. 544, 28 L. Ed. 542; *United States* v. *Bank of New York & Trust Co.*, 296 U. S. 463, 479, 56 S. Ct. 343, 80 L. Ed. 331), and in line with this doctrine it is held that, where an action under the Federal Employers' Liability Act is brought in a State court which has jurisdiction over the action, that Court not only can, but must, exercise its jurisdiction (*Second Employers' Liability Cases* [*Mondou* v. *New York, N. H. & H. R. Co.*], 223 U. S. 1, 32 S. Ct. 169, 56 L. Ed. 327; *McKnett* v. *St. Louis & S. F. R. Co.*, 292 U. S. 230, 54 S. Ct. 690, 78 L. Ed. 1227; *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698, 62 S. Ct. 827, 86 L. Ed. ——).

It necessarily conflicts with and narrows these principles to construe Section 6 of the Federal Employers' Liability Act as the Supreme Court of Illinois did construe it, so as to require that an action brought in a State court under the Act, in order to meet the requirements of that section as to the time within which the action can be commenced, not only must be brought within such time, but also must be brought in a court having jurisdiction to hear and determine the merits of the action. The effect of the decision of the Supreme Court of Illinois in this case is to rule that a State court having a limited jurisdiction over an action under the Federal Employers' Liability Act is not under a duty to exercise that limited jurisdiction. Furthermore the effect of the decision of the Supreme Court of Illinois is, in view of its decision in *Central Illinois Public Service Co.* v. *Industrial Commission*, *supra*, to discriminate in that regard between rights accruing under the Federal Employers' Liability Act and rights accruing under State laws—for it appears that if this petitioner's cause of action had accrued under the laws of Illinois it would, under the

authority of *Central Illinois Public Service Co.* v. *Industrial Commission, supra*, have been held to have been "commenced" within two years from the day the cause of action accrued.

> "The plaintiff is cast out because he is suing to enforce a federal act. A state may not discriminate against rights arising under federal laws." (*McKnett* v. *St. L. & S. F. R. Co.*, 292 U. S., l. c. 234).

To uphold the construction placed upon Section 6 of the Federal Employers' Liability Act by the Supreme Court of Illinois necessarily would result in an anomalous doctrine that a State court having a limited jurisdiction over an action to enforce a federal right would not be obliged to exercise that limited jurisdiction, while a State court having full jurisdiction over the action would be compelled to exercise its jurisdiction thereover.

IV.

It may be suggested that petitioner contends that the trial and verdict had in this action in the City Court of Granite City are valid, but petitioner does not intend to be so understood. On the contrary, petitioner recognizes the invalidity of that trial and judgment in the light of the decisions in *Werner* v. *Illinois Central R. Co.*, *supra*, and *Mitchell* v. *Louisville & N. R. Co.*, *supra*, and recognizes that all proceedings in the said City Court, excepting those relating to the change of venue to the Circuit Court, were void. He does, however, insist that his action was "commenced" within the time required by Section 6 of the Federal Employers' Liability Act in a court which had a limited jurisdiction over the action, with the power and authority to change the venue of the action, either before or after trial, to a court having full jurisdiction thereover, so that, upon the venue being changed to the Circuit Court of Madison

County, that court was invested with full jurisdiction to hear and determine the action, and petitioner was and is entitled to a hearing and determination of his cause on the merits in said Circuit Court.

It also might be suggested that petitioner's action was not "commenced" within the time required by Section 6 of the Federal Employers' Liability Act because, the jurisdiction of the City Court of Granite City being limited to a granting of a change of venue under the Illinois Venue Act, that court did not acquire jurisdiction over the persons of the respondents (defendants) by virtue of the summons issued out of that court. The fact is, however, that the City Court of Granite City acquired jurisdiction over the persons of respondents (defendants), wholly irrespective of the validity of the summons, when the respondents appeared generally and filed their answer in that court (R. 12-18), under which circumstances the issuance and service of summons was not essential to the commencement of the action (*Kobelein v. First National Bank of St. Elmo*, 376 Ill. 450, 34 N. E. 2d 388). Furthermore, the question of when petitioner's action was commenced was and is not dependent upon the acquisition of jurisdiction of the persons of respondents (defendants) by the City Court of Granite City, for, as was said in *Vincent v. McElvain*, 304 Ill. 160, 136 N. E. 502, 503:

> "It is well established by repeated decisions of this and other courts that a suit or action is commenced when a party puts in motion, under his claim, the instruments of the court. * * *. We know of no authority which holds that a suit is not commenced until the court gets jurisdiction of the defendant."

To this same effect are the decisions in *Central Illinois Public Service Co. v. Industrial Commission*, *supra*, and *Bates Mfg. Co. v. United States*, 303 U. S. 567, 58 S. Ct. 694,

82 L. Ed. 1020. In this connection, too, there should not be overlooked the amendment of July 6, 1937, to the Illinois Civil Practice Act (Laws of Illinois, 1937, p. 989; Illinois Revised Statutes 1941, chap. 110, (129) providing, in so far as here relevant, that:

> "Every civil action, unless otherwise expressly provided by statute shall be commenced by the filing of a complaint."

Conclusion.

From the foregoing, we submit that it clearly appears that petitioner's action was "commenced" within two years from the day his cause of action accrued in a court which had a limited jurisdiction over the action sufficient to empower that court to change the venue of the action to a court having full jurisdiction thereover; that, under the applicable doctrines of the decisions of this Court, it was not only the right, but the duty, of that court to exercise its limited jurisdiction over the action by changing the venue to the proper court; that effecting the change of venue did not constitute a dismissal of the action in the court from which the venue was changed and the commencement of a new action in the court to which the venue was changed; and that the petitioner's action was "commenced" within the time required by Section 6 of the Federal Employers' Liability Act, notwithstanding that the change of venue, from the court having a limited jurisdiction over the action to the court having full jurisdiction thereover, took place after the time limited by that section for the commencement of the action.

It consequently follows that the decision of the Supreme Court of Illinois was in error in ruling to the contrary upon the theory that Section 6 of the Federal Employers' Liability Act conditioned recovery under that Act upon both commencing an action within the time limited and com-

mencing the action in a court having full jurisdiction thereover. Petitioner, therefore, respectfully submits that this Honorable Court should issue a writ of certiorari in order that such error may be corrected, in order that the judgment and opinion of the Supreme Court of Illinois may be reversed, and in order that petitioner may have a trial of his action upon the merits in a court having jurisdiction to hear and determine the same.

Respectfully submitted,

ROBERTS P. ELAM,
Counsel for Petitioner.

MARK D. EAGLETON and
JOSEPH B. MCGLYNN,
Of Counsel.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. [redacted] 25

BENJAMIN F. BELCHER,

Petitioner,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
A CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

ROBERTS P. ELAM,
Counsel for Petitioner.

MARK D. EAGLETON,
JOSEPH B. MCGLYNN,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 682

BENJAMIN F. BELCHER,

Petitioner,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
A CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Now comes Benjamin F. Belcher, petitioner, and respectfully petitions this Honorable Court to grant a writ of certiorari to the Supreme Court of the State of Illinois, and to remove therefrom to this Court for review, the record in the case lately pending in said Supreme Court of the State of Illinois, styled *Benjamin F. Belcher, plaintiff-appellant, vs. Louisville & Nashville Railroad Company, a corporation, defendant-appellee*, being cause No. 27,276 on the docket of said Supreme Court of the State of Illinois.

The duly certified record, including all the proceedings in the City Court of East St. Louis, Illinois, wherein said cause was instituted, in the Circuit Court of St. Clair County, Illinois, to which the venue of said cause was changed and in which judgment was entered, and in the Supreme Court of the State of Illinois, to which an appeal was taken by said Benjamin F. Belcher from the judgment of the trial court, is filed herewith under separate cover.

Your petitioner represents that he is aggrieved by the judgment of the Supreme Court of the State of Illinois entered in said cause, wherein the said Supreme Court of Illinois affirmed the judgment of the trial court, and on the 12th day of November, 1943, thereafter, denied this petitioner's petition for a rehearing of said cause, and entered a final judgment affirming the judgment of the trial court.

Your petitioner states that the matters of issue in said cause are of a Federal nature and are of peculiar gravity and importance, in that said suit was brought under the Federal Employers' Liability Act to recover damages for personal injuries sustained by this petitioner on February 15, 1939, as a result of the violation of the Federal Safety Appliance Act by the respondent Louisville & Nashville Railroad Company, a corporation, and in that the decision of the Supreme Court of the State of Illinois, complained of, is in conflict with the applicable decisions of this Honorable Court upon the questions involved, and the principles announced by this Court in those decisions.

Summary and Short Statement of the Matter Involved.

On June 22, 1940, this petitioner, as plaintiff, filed in the City Court of East St. Louis, Illinois, his complaint against the respondent, as defendant (R. 2), stating a cause of action against said respondent under the Federal Employers' Liability Act (U. S. C. [1934 Ed.] Title 45, §§ 51-59), for injuries sustained by this petitioner in or near the City of

Nashville, Tennessee, on the 15th day of February, 1939 (R. 2-5), by reason of an alleged violation by respondent of the provisions of the Federal Safety Appliance Act (U. S. C. [1934 Ed.], Title 45, §§ 1-16), relating to hand brakes. Summons was duly issued and served upon the respondent (R. 6).

Thereafter, on September 9, 1940, the respondent filed in said City Court of East St. Louis, Illinois, its amended answer (R. 6-15) by way of denial of various of the allegations of the complaint, coupled with a plea of release.

Thereafter, on September 23, 1940, petitioner duly filed in said City Court of East St. Louis, Illinois, his reply to said answer (R. 16-20).

Thereafter, on October 14, 15, and 16, 1940, the case was duly tried to a jury in the said City Court of East St. Louis, Illinois (R. 25-26), resulting in a verdict in favor of this petitioner, as plaintiff, and against respondent, as defendant, in the sum of $20,000.00 (R. 21, 26), but thereafter, on September 18, 1941, this verdict was set aside and a new trial granted (R. 21-22).

Thereafter, on March 16, 1942, the Supreme Court of Illinois decided the cases of *Werner* v. *Illinois Central Railroad Co.*, 379 Ill. 559, 42 N. E. 2d 82, and *Mitchell* v. *Louisville & N. R. Co.*, 379 Ill. 522, 42 N. E. 2d 86, ruling, in substance and effect, that each of the various City Courts in Illinois was without jurisdiction to hear and determine the subject matter of any action involving a cause of action which arose outside the territorial limits of the City in which the particular City Court was located. Accordingly, this petitioner thereafter filed in the City Court of East St. Louis, Illinois, a motion for a change of venue in this action to the Circuit Court of St. Clair County, Illinois, under the provisions of Chapter 146, § 36, Illinois Revised Statutes 1941, because the action had been com-

menced in the wrong court—that is, in a court which, under the decisions in *Werner* v. *Illinois Central Railroad Co.*, *supra*, and *Mitchell* v. *Louisville & N. R. Co.*, *supra*, was without jurisdiction to hear and determine the subject matter of petitioner's action, because the cause of action had arisen outside the territorial limits of East St. Louis, Illinois (R. 23-24). Petitioner's motion for a change of venue was, on July 17, 1942, sustained by the said City Court of East St. Louis, Illinois, and the venue of said action was duly ordered changed to the Circuit Court of St. Clair County, Illinois (R. 28-29). On August 10, 1942, the pleadings, papers, documents and exhibits, and a duly certified transcript of all the orders, in said cause in the said City Court of East St. Louis, Illinois, were duly filed in the said Circuit Court of St. Clair County, Illinois, on change of venue (R. 1, 29).

Thereafter, on August 15, 1942, the respondent (defendant) filed in the Circuit Court of St. Clair County, Illinois, its motion to dismiss petitioner's (plaintiff's) cause (R. 29-32). That motion to dismiss was based, substantially, upon the grounds that because the said City Court of East St. Louis, Illinois, was without jurisdiction to hear and determine the subject matter (merits) of plaintiff's action, (a) all orders entered, and all proceedings had, in said City Court of East St. Louis, Illinois, including the order changing the venue in said action to the said Circuit Court of St. Clair County, were null, void and of no effect, (b) if the statute under which the change of venue was granted (Chapter 146, § 36, Illinois Revised Statutes 1941) authorizes a City Court to change the venue of an action, of which it is without jurisdiction to hear and determine the merits, to a court properly having jurisdiction to hear and determine the action, then such statute is contrary to Section 1, Article VI of the Constitution of Illinois, and is null and void, and (c) such statute, if it authorizes a

change of venue under such circumstances, is in conflict with Section 6 of the Federal Employers' Liability Act (U. S. C. [1934 Ed.] Title 45, §56), and is null and void.

This motion of respondent (defendant), to dismiss, was by the said Circuit Court of St. Clair County, Illinois, sustained on November 27, 1942, and judgment of dismissal was then entered accordingly (R. 32). From that order and judgment, petitioner (plaintiff) duly appealed to the Supreme Court of the State of Illinois (R. 33-34), where the judgment of the Circuit Court of St. Clair County, Illinois, was, on September 24, 1943, affirmed (R. 36-39).

This petitioner, in due time, filed in the said Supreme Court of Illinois his petition for a rehearing (R. 40-50), which was entertained, but on the 12th day of November, 1943, the said Supreme Court of Illinois denied said petition for a rehearing (R. 51). The said Supreme Court of Illinois having denied petitioner's petition for rehearing on said date, the judgment of said Court thereupon became final.

Opinions of the Courts Below.

There was no opinion of the trial court in the case here sought to be reviewed.

The opinion of the Supreme Court of the State of Illinois appears at pages 36-38, inclusive, of the printed transcript of the record herewith filed. It is reported as *Belcher* v. *Louisville & Nashville R. Co.*, 384 Ill. 281, 51 N. E. 2d 282, and is founded in its entirety upon a parallel case decided on the same day and reported as *Herb* v. *Pitcairn, et al.*, 384 Ill. 237, 51 N. E. 2d 277.

Jurisdiction of this Court.

1.

Jurisdiction of this Court is based upon the Judicial Code, Section 237, as amended by the Act of February 13,

1925, 43 Stat. 937, U. S. Code, Title 28, Section 344, paragraph (b) permitting petitions for certiorari to be prayed for and issued to the highest courts of the various states where a title, right, privilege or immunity is specially set up or claimed under a statute of the United States.

The action here sought to be reviewed, having been based upon the Federal Employers' Liability Act (Act of Apr. 22, 1908, c. 149, 35 Stat. 65, as amended by Act of Apr. 5, 1910, c. 143, 36 Stat. 291; U. S. C. [1934 Ed.] Title 45, §§ 51-59), and the Federal Safety Appliance Act (Act of Mar. 2, 1893, c. 196, 29 Stat. 531, as amended by Act of Mar. 2, 1903, c. 976, 32 Stat. 943 and Act of Apr. 14, 1910, c. 160, 36 Stat. 298; U. S. C. [1934 Ed.] Title 45, §§ 1-16), the jurisdiction of this Court attaches because the Supreme Court of Illinois, in affirming the judgment of the trial court, has decided a Federal question of substance in a way probably not in accord with the applicable and controlling principles and decisions of this Court. Some authorities sustaining the jurisdiction are:

Seaboard Air Line R. Co. v. *Horton*, 233 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062;

Minneapolis, St. P. & S. S. M. R. Co. v. *Gomon*, 269 U. S. 406, 46 S. Ct. 129, 70 L. Ed. 335;

Gulf M. & N. R. Co. v. *Wells*, 275 U. S. 455, 48 S. Ct. 151, 72 L. Ed. 370;

Atlantic Coast Line R. Co. v. *Davis*, 279 U. S. 34, 49 S. Ct. 210, 73 L. Ed. 601.

2.

The Supreme Court of Illinois is the highest court of that State.

The original date of the judgment of the Supreme Court of Illinois here sought to be reviewed is September 24, 1943.

Petitioner's motion for a rehearing was filed October 19, 1943, within the time provided by the rules of the Supreme Court of Illinois, and said petition for rehearing was denied November 12, 1943.

Questions Presented.

Only one basic question is raised in this Court on this record, viz: Whether an action under the Federal Employers' Liability Act, instituted within two years from the day the cause of action accrued, in a State court which was without jurisdiction to hear and determine the merits of the action but which had a limited jurisdiction to change the venue of such action to a court having complete jurisdiction thereof, the venue of which action was changed to such latter court more than two years after the cause of action accrued, is "commenced within two years from the day the cause of action accrued" as required by Section 6 of the Federal Employers' Liability Act (Act of Apr. 22, 1908, c. 149, § 6, 35 Stat. 66, as amended by Act of Apr. 5, 1910, c. 143, § 1, 36 Stat. 291; U. S. C. [1934 Ed.] Title 45, § 56).

Subsidiary to this main question, there is the question of whether Section 6 of the Federal Employers' Liability Act requires suits brought under that Act in State courts to be commenced in a State court which has full and complete jurisdiction over the action.

Summary of Reasons for Allowance of Writ.

I.

In this case the Supreme Court of Illinois has decided a Federal question of substance, not heretofore determined by this Court upon a like statement of facts, in a way probably not in accord with the applicable and controlling principles and decisions of this Court.

The question is one of a general nature, involving the rights and affecting the interest of an extensive class of employees of interstate carriers by railroad, and involving the rights and liabilities of such carriers.

II.

The Supreme Court of Illinois has erroneously ruled that

(a) Recovery under the Federal Employers' Liability Act is conditioned not only upon commencing an action within two years from the date of the injury, but also upon commencing such action within such time in a court having jurisdiction to hear and determine the same—that is, that it is not enough for the action to be commenced in a court having a limited jurisdiction over the action, but it must be commenced in a court having full and complete jurisdiction.

(b) Where an action under the Federal Employers' Liability Act is instituted, within two years from the day the cause of action accrued, in a State court which was without jurisdiction to hear and determine the merits of the action but which had a limited jurisdiction to change the venue of such action to a court having complete jurisdiction thereover, the action is not "commenced within two years from the day the cause of action accrued" as required by Section 6 of the Federal Employers' Liability Act, if the change of venue to the latter court takes place more than two years after the day the cause of action accrued.

III.

The opinions and decisions of this Court, as well as those of other Federal courts hold that

(a) The Federal Employers' Liability Act is a remedial act which should be construed liberally so as to prevent the mischief and advance the remedy.

(b) The State courts, where their jurisdiction is appropriate, have concurrent jurisdiction with the Federal courts over actions under the Federal Employers' Liability Act.

(c) Where an action under the Federal Employers' Liability Act is brought in a State court, that court not only can, but must, exercise such jurisdiction as it may have over the action.

(d) An action or suit is commenced when a party puts in motion, under his claim, the instruments or process of a court of justice.

It follows that, under the controlling decisions of this Court, where (as here) an action under the Federal Employers' Liability Act is instituted, within two years from the day the cause of action accrued, in a State court which is without jurisdiction to hear and determine the merits of the action but which has a limited jurisdiction to change the venue of such action to a court having complete jurisdiction thereof, the action is "commenced within two years from the day the cause of action accrued" as required by Section 6 of the Federal Employers' Liability Act, notwithstanding that the change of venue to the latter court actually took place more than two years after the cause of action accrued.

Prayer.

For the purpose of correcting the errors complained of, and to the end that the rights of the petitioner may be determined in accordance with the Federal law, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court, directed to the Supreme Court of the State of Illinois, commanding it to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and proceedings of the said Supreme Court of Illinois in the within de-

scribed cause of Benjamin F. Belcher, plaintiff-appellant, vs. Louisville & Nashville Railroad Company, a corporation, defendant-appellee, No. 27,276, to the end that the judgment of said Supreme Court of Illinois in said cause may be reviewed by this Court, as provided by law, and that your petitioner may have such other relief as to this Court may seem appropriate, and that the judgment of said Supreme Court of Illinois may be reversed by this Honorable Court.

BENJAMIN F. BELCHER,
Petitioner.

By ROBERTS P. ELAM,
Counsel for Petitioner.

MARK D. EAGLETON and
JOSEPH B. MCGLYNN,
Of Counsel.

SUPPORTING BRIEF.

This case is a parallel case to that of *Victor J. Herb, Petitioner*, v. *Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers for Wabash Railway Company, a corporation, Respondents*, No. 681, October Term, 1943, in this Court, in which a petition for writ of certiorari this day has been filed seeking a review of the decision of the Supreme Court of Illinois in *Herb* v. *Pitcairn, et al.*, 384 Ill. 237, 51 N. E. 2d 277, which was the foundation for the decision of the Supreme Court of Illinois in, and was decided by that court on the same day as, the case at bar.

The two cases involve parallel sets of facts and identical questions of law, so that it is needless to here reiterate what has been said in the supporting brief annexed to the petition for writ of certiorari in the *Herb* v. *Pitcairn* case. In support of the petition for writ of certiorari in the case at bar, we most respectfully refer the Court to the supporting brief in the *Herb* v. *Pitcairn* case.

Respectfully submitted,

ROBERTS P. ELAM,
Counsel for Petitioner.

MARK D. EAGLETON and
JOSEPH B. MCGLYNN,
Of Counsel.

FILE COPY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

VICTOR J. HERB,
Petitioner,

v.

NORMAN B. PITCAIRN and FRANK C. NICODEMUS, JR., Receivers for Wabash Railway Company, a Corporation,
Respondents.

No. 24.

BENJAMIN F. BELCHER,
Petitioner,

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, a Corporation,
Respondent.

No. 25.

On Certiorari to the Supreme Court of the State of Illinois.

BRIEF OF PETITIONERS

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Illinois Bar Journal (May, 1944), Vol. 32, No. 9, pp. 347 et seq. 26

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

VICTOR J. HERB,
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NORMAN B. PITCAIRN and FRANK C. NICODEMUS, JR., Receivers for Wabash Railway Company, a Corporation,
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BENJAMIN F. BELCHER,
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Respondent.

No. 25.

On Certiorari to the Supreme Court of the State of Illinois.

BRIEF OF PETITIONERS.

The above styled cases are here on writs of certiorari awarded by this Court on March 27, 1944 (R. 45, in Case No. 24; R. 42, in Case No. 25), to review the final judgments, opinions and decisions of the Supreme Court of Illinois entered and rendered in said causes on September 24, 1943. The two cases involve parallel sets of facts and identical questions of law, and, since the orders granting

certiorari consolidated the two cases for argument, they are briefed together here under a single cover, but with separate statements of fact containing appropriate page references to the separate respective printed records in this Court.

Opinions of the Courts Below.

There were no opinions rendered by the trial courts in these cases.

In Case No. 24, the opinion of the Supreme Court of Illinois is reported as *Herb v. Pitcairn et al.*, 384 Ill. 237, 51 N. E. 2d 277, and appears at pages 25-33 of the printed transcript of record in that case in this Court.

In Case No. 25, the opinion of the Supreme Court of Illinois (which is based entirely upon the opinion of that Court in Case No. 24) is reported as *Belcher v. Louisville & Nashville R. Company*, 384 Ill. 281, 51 N. E. 2d 282, and appears at pages 27-29 of the printed transcript of record in that case in this Court.

Jurisdiction of This Court.

Jurisdiction of this Court is based upon the Judicial Code, Section 237, as amended by the Act of February 13, 1925, 43 Stat. 937, U. S. Code, Title 28, Section 344, paragraph (b), permitting petitions for certiorari to be prayed for and issued to the highest courts of the various states where a title, right, privilege or immunity is specially set up or claimed under a statute of the United States.

The actions here sought to be reviewed having been based upon the Federal Employers' Liability Act (Act of Apr. 22, 1908, c. 149, 35 Stat. 65, as amended by Act of Apr. 5, 1910, c. 143, 36 Stat. 291; U. S. C. [1934 Ed.], Title 45, §§ 51-59), and the Federal Safety Appliance Act (Act of Mar. 2, 1893, c. 196, 29 Stat. 531, as amended by Act of Mar. 2, 1903, c. 976, 32 Stat. 943, and Act of Apr. 14,

1910, c. 160, 36 Stat. 298; U. S. C. [1934 Ed.], Title 45, § 1-16), the jurisdiction of this Court attaches because the Supreme Court of Illinois, the highest court of that State, in affirming the judgments of the trial courts, has decided a Federal question of substance in a way probably not in accord with the applicable and controlling principles and decisions of this Court. Some authorities sustaining the jurisdiction are:

Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062;

Minneapolis, St. P. & S. S. M. R. Co. v. Gotcan, 269 U. S. 406, 46 S. Ct. 129, 70 L. Ed. 335;

Gulf M. & N. R. Co. v. Wells, 275 U. S. 455, 48 S. Ct. 151, 72 L. Ed. 370;

Atlantic Coast Line R. Co. v. Davis, 279 U. S. 34, 49 S. Ct. 210, 73 L. Ed. 601.

Statement in Case No. 24.

On December 22, 1937, petitioner Herb, as plaintiff, filed in the City Court of Granite City, Illinois, his complaint against the respondents Pitcairn et al., as defendants (R. 5-9), stating a cause of action against said respondents under the Federal Employers' Liability Act (U. S. C. [1934 Ed.], Title 45, § 51-59) for injuries sustained by him in or near the City of Decatur, Illinois, on the 23rd day of November, 1936 (R. 6), by reason of an alleged violation by respondents of the provisions of the Federal Safety Appliance Act (U. S. C. [1934 Ed.], Title 45, § 1-16), relating to hand brakes. Summons was duly issued and served upon the respondents (R. 9).

Thereafter, on February 28, 1938, the said respondents filed in said City Court of Granite City, Illinois, their answer (R. 9-13) by way of denial of various of the allegations of the complaint, coupled with a plea of assumption of risk.

Thereafter, on March 5, 1938, petitioner Herb duly filed

in said City Court of Granite City, Illinois, his reply to said answer (R. 13).

Thereafter, on October 13, 14 and 15, 1938, the case was duly tried to a jury in the said City Court of Granite City, Illinois (R. 2-3), resulting in a verdict in favor of petitioner Herb, as plaintiff, and against said respondents, as defendants, in the sum of $30,000.00 (R. 3, 13), but thereafter this verdict was set aside and a judgment entered for respondents (defendants) non obstante veredicto (R. 3). Petitioner Herb duly appealed from the judgment non obstante veredicto (R. 3-4, 13; cf. *Herb v. Pitcairn*, 306 Ill. App. 583, 29 N. E. 2d 543, and *Herb v. Pitcairn*, 377 Ill. 405, 36 N. E. 2d 555). As a result of that appeal, the judgment entered non obstante veredicto was reversed, and the cause was remanded to the City Court of Granite City, Illinois, for further proceedings (R. 14-15).

Thereafter, and after the action had been re-docketed in the City Court of Granite City, Illinois (R. 4, 15-17), the Supreme Court of Illinois, on March 16, 1942, decided the cases of *Werner v. Illinois Central R. Co.*, 379 Ill. 559, 42 N. E. 2d 82, and *Mitchell v. Louisville & Nashville R. Co.*, 379 Ill. 522, 42 N. E. 2d 86, ruling, in substance and effect, that each of the various City Courts in Illinois was without jurisdiction to hear and determine the subject matter of any action involving a cause of action which arose outside the territorial limits of the City in which the particular City Court was located. It thus appearing that petitioner's action had been commenced in the wrong court—that is, in a court which, under the decisions in *Werner v. Illinois Central R. Co., supra*, and *Mitchell v. Louisville & Nashville R. Co., supra*, was without jurisdiction to hear and determine the subject matter of the action because the cause of action had arisen outside the territorial limits of Granite City, Illinois—petitioner filed in his cause in the City Court of Granite City, Illinois, a motion for a change of venue of the action to the Circuit

Court of Madison County, Illinois (R. 17-18), under the provisions of Chapter 146, Section 36, Illinois Revised Statutes 1941, providing for a change of venue to the "proper court" where an action had been commenced in the "wrong court."[1] Petitioner's motion for a change of venue was, on July 17, 1942, sustained by the said City Court of Granite City, Illinois, and the venue of said action was duly ordered changed to the Circuit Court of Madison County, Illinois (R. 5). On July 31, 1942, the pleadings, papers, documents and exhibits, and a duly certified transcript of all the orders, in said cause in the said City Court of Granite City, Illinois, were duly filed in the said Circuit Court of Madison County, Illinois, on change of venue (R. 1-5).

Thereafter, on August 21, 1942, the respondents (defendants) filed in the Circuit Court of Madison County, Illinois, their motion to dismiss petitioner's (plaintiff's) cause (R. 18-21). That motion to dismiss was based, substantially, upon the grounds that, because the said City Court of Granite City, Illinois, was without jurisdiction to hear and determine the subject matter (merits) of plaintiff's action, (a) all orders entered, and all proceedings had, in said City Court of Granite City, Illinois, including the order changing the venue in said action to the said Circuit Court of Madison County, were null, void and of no effect, (b) if the statute under which the change of venue was granted (Chapter 146, Section 36, Illinois Revised Statutes 1941) authorizes a City Court to change the venue of an action, of which it is without jurisdiction to hear and determine the merits, to a court properly having jurisdiction to hear and determine the action, then such statute is contrary to Section 1, Article VI of the Constitution of Illinois, and is null and void, and (c) such stat-

[1] This statute is set out verbatim at page 21 of this brief. It is sometimes referred to in the Illinois decisions, and in this brief, as the "Illinois Venue Act."

ute, if it authorizes a change of venue under such circumstances, is in conflict with Section 6 of the Federal Employers' Liability Act (U. S. C. [1934 Ed.], Title 45, § 56), and is null and void.

This motion of respondents (defendants), to dismiss, was by the said Circuit Court of Madison County, Illinois, sustained on November 27, 1942, and judgment of dismissal was then entered accordingly (R. 24). From that order and judgment, petitioner (plaintiff) duly appealed to the Supreme Court of the State of Illinois (R. 23), where the judgment of the Circuit Court of Madison County, Illinois, was, on September 24, 1943, affirmed (R. 24-34).

Petitioner Herb, in due time, filed in the said Supreme Court of Illinois his petition for a rehearing (R. 34-41), which was entertained, but on the 12th day of November, 1943, the said Supreme Court of Illinois denied said petition for a rehearing (R. 42). The said Supreme Court of Illinois having denied petitioner's petition for rehearing on said date, the judgment of said Court thereupon became final.

Statement in Case No. 25.

On June 22, 1940, petitioner Belcher, as plaintiff, filed in the City Court of East St. Louis, Illinois, his complaint against the respondent Louisville & Nashville R. Co., as defendant (R. 1), stating a cause of action against said respondent under the Federal Employers' Liability Act (U. S. C. [1934 Ed.], Title 45, §§ 51-59), for injuries sustained by him in or near the City of Nashville, Tennessee, on the 15th day of February 1939 (R. 1-4), by reason of an alleged violation by respondent of the provisions of the Federal Safety Appliance Act (U. S. C. [1934 Ed.], Title 45, §§ 1-16), relating to hand brakes. Summons was duly issued and served upon the respondent (R. 4).

Thereafter, on September 9, 1940, the said respondent filed in said City Court of East St. Louis, Illinois, its amended answer (R. 5-11) by way of denial of various of the allegations of the complaint, coupled with a plea of release.

Thereafter, on September 23, 1940, petitioner Belcher duly filed in said City Court of East St. Louis, Illinois, his reply to said answer (R. 12-15).

Thereafter, on October 14, 15, and 16, 1940, the case was duly tried to a jury in the said City Court of East St. Louis, Illinois (R. 18-19), resulting in a verdict in favor of petitioner Belcher, as plaintiff, and against said respondent, as defendant, in the sum of $20,000.00 (R. 15, 19), but thereafter, on September 18, 1941, this verdict was set aside and a new trial granted (R. 15-16, 19-20).

Thereafter, on March 16, 1942, the Supreme Court of Illinois decided the cases of *Werner v. Illinois Central R. Co.*, 379 Ill. 559, 42 N. E. 2d 82, and *Mitchell v. Louisville & Nashville R. Co.*, 379 Ill. 522, 42 N. E. 2d 86, ruling, in substance and effect, that each of the various City Courts in Illinois was without jurisdiction to hear and determine the subject matter of any action involving a cause of action which arose outside the territorial limits of the City in which the particular City Court was located. It thus appearing that petitioner's action had been commenced in the wrong court—that is, in a court which, under the decisions in *Werner v. Illinois Central R. Co., supra*, and *Mitchell v. Louisville & Nashville R. Co., supra*, was without jurisdiction to hear and determine the subject matter of the action because the cause of action had arisen outside the territorial limits of East St. Louis, Illinois—petitioner filed in his cause in the City Court of East St. Louis, Illinois, a motion for a change of venue of the action to the Circuit Court of St. Clair County, Illinois (R. 17), under the provisions of Chapter 146, Section 36, Illinois Revised Statutes 1941, providing for a change of venue to

the "proper court" where an action had been commenced in the "wrong court."[2] Petitioner's motion for a change of venue was, on July 17, 1942, sustained by the said City Court of East St. Louis, Illinois, and the venue of said action was duly ordered changed to the Circuit Court of St. Clair County, Illinois (R. 20-21). On August 10, 1942, the pleadings, papers, documents and exhibits, and a duly certified transcript of all the orders, in said cause in the said City Court of East St. Louis, Illinois, were duly filed in the said Circuit Court of St. Clair County, Illinois, on change of venue (R. 1, 21).

Thereafter, on August 15, 1942, the respondent (defendant) filed in the Circuit Court of St. Clair County, Illinois, its motion to dismiss petitioner's (plaintiff's) cause (R. 21-23). That motion to dismiss was based, substantially, upon the grounds that, because the said City Court of East St. Louis, Illinois, was without jurisdiction to hear and determine the subject matter (merits) of plaintiff's action, (a) all orders entered, and all proceedings had, in said City Court of East St. Louis, Illinois, including the order changing the venue in said action to the said Circuit Court of St. Clair County, were null, void and of no effect, (b) if the statute under which the change of venue was granted (Chapter 146, § 36, Illinois Revised Statutes, 1941) authorizes a City Court to change the venue of an action, of which it is without jurisdiction to hear and determine the merits, to a court properly having jurisdiction to hear and determine the action, then such statute is contrary to Section 1, Article VI of the Constitution of Illinois, and is null and void, and (c) such statute, if it authorizes a change of venue under such circumstances, is in conflict with Section 6 of the Federal Employers' Liability Act (U. S. C. [1934 Ed.], Title 45, § 56), and is null and void.

[2] This statute is set out verbatim at page 21 of this brief.

This motion of respondent (defendant), to dismiss, was by the said Circuit Court of St. Clair County, Illinois, sustained on November 27, 1942, and judgment of dismissal was then entered accordingly (R. 23). From that order and judgment, petitioner (plaintiff) duly appealed to the Supreme Court of the State of Illinois (R. 24-25), where the judgment of the Circuit Court of St. Clair County, Illinois, was, on September 24, 1943, affirmed (R. 26-30).

Petitioner Belcher, in due time, filed in the said Supreme Court of Illinois his petition for a rehearing (R. 30-38), which was entertained, but on the 12th day of November, 1943, the said Supreme Court of Illinois denied said petition for a rehearing (R. 39). The said Supreme Court of Illinois having denied petitioner's petition for rehearing on said date, the judgment of said Court thereupon became final.

Basis for the Decisions Below.

The opinion of the Supreme Court of Illinois in petitioner Herb's case,[3] which was controlling and decisive in petitioner Belcher's case,[4] leaves some doubt as to the true basis for that Court's decision that petitioners could not maintain their respective actions in the Illinois Circuits Courts after change of venue under the Illinois Venue Act (Illinois Revised Statutes 1941, Chap. 146, ¶ 36) from the Illinois City Courts.

At one point, it appears that the opinion may be based upon the broad postulate that, if a court has no jurisdiction to hear and determine an action or proceeding initiated therein, there can be no jurisdiction giving effect to any matters preliminary to judgment, including the steps

[3] 384 Ill. 237, 51 N. E. 2d 277, R. 35-43 in Case No. 24

[4] 384 Ill. 281, 51 N. E. 2d 282, R. 27-29 in Case No. 25

necessary to a "commencement" of the action. In this connection, the Illinois Court's opinion first said:[5]

> "The question involved relates to the effect of the proceedings had in a court wholly incompetent to render a valid judgment, because *if the judgment to be rendered would be void it necessarily follows the preliminary proceedings of the court, necessary to rendition of judgment, must likewise be void. If the court has no jurisdiction of the subject matter for judgment there can be no jurisdiction giving effect to process or pleadings.*" (Emphasis supplied.)

and then goes on to say:[6]

> "It is clear a suit was not commenced by filing the present suit in the city court of Granite City, or by issuing summons or filing a complaint. Lacking requisite jurisdiction because of the provisions of the constitution limiting it to cases arising within the limits of the city, such court was wholly incompetent to render any judgment *or to authorize any proceedings which would result in a judgment.*" (Emphasis supplied.)

However, the opinion clearly recognizes, and reaffirms, the decisions in two earlier cases in that Court[7] in which suits had been initiated in courts of record having no jurisdiction to hear and determine them, but in which it was held that the Illinois Venue Act (Illinois Revised Statutes 1941, Chap. 146, § 36) had given such courts a limited jurisdiction to change the venue to the proper courts, and in which were upheld the beginnings ("commencement") of the suits in courts lacking power to finish what had been begun, and the power in such courts, under the Illinois Venue

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5 384 Ill. 1 c. 241, 51 N. E. 2d, 1 c. 279, R. 27 in Case No. 24.

6 384 Ill., 1 c. 247, 51 N. E. 2d, 1 c. 282, R. 32 in Case No. 24.

7 Central Illinois Public Service Co. v. Industrial Commission, 293 Ill. 62, 127 N. E. 80; Gill v. Lynch, 367 Ill. 203, 10 N. E. 2d 812—both hereinafter discussed at length.

Act, to give continuity to the suits by sending them to courts having power to hear and determine them.

Another part of the opinion indicates that the Court's decision may be based upon the proposition that the commencement of the petitioners' (plaintiffs') actions was dependent upon jurisdiction over the persons of the respondents (defendants), for it is said:[a]

> "This would give the order of transfer by the city court the effect of vitalizing process that was void and considering a case commenced and pending in a proper court *during a period when, in legal contemplation, no judicial control of defendants had yet been exercised.*
>
> "Conceding, but not deciding, that in proper cases a court without jurisdiction of the subject matter could by statute be authorized to transfer its proceedings to a court having jurisdiction, still the condition that the action be commenced within two years is not met."

However, the real basis for the decisions below appears to be that the terms of Section 6 of the Federal Employers' Liability Act (Act of Apr. 22, 1908, c. 149, § 6, 35 Stat. 66, as amended by Act of Apr. 5, 1910, c. 143, § 1, 36 Stat. 291; 45 U. S. C. A. [1934 Ed.], § 56) required not only that employees' actions under the Act be brought "within two years from the day the cause of action accrued," but, also, that they be brought within such time in a court having jurisdiction to hear and determine them. The opinion of the Supreme Court of Illinois in this connection first said:[b]

> "The material point for consideration is whether the plaintiff has commenced an action within two years of the date of his injury *in a court having juris-*

[a] 384 Ill. 1, c. 244, 51 N. E. 2d, 1, c. 281, R. 30 in Case No. 24.

[b] 384 Ill. 1, c. 240-241, 51 N. E. 2d, 1, c. 279, R. 27 in Case No. 24.

> *diction to hear and determine the same, as required by section 6 of the Federal Employers' Liability Act,* by transferring the cause from a court having no jurisdiction over it at a date which, if then originally filed in the latter court, could not be maintained because not filed within the statutory time." (Emphasis supplied),

and then went on to say:[10]

> "* * * we observe recovery under the Federal Employers' Liability Act is conditioned upon two things: (1) commencing an action within two years from the date of the injury; and (2) *commencing such action in a court having jurisdiction to hear and determine the same.* * * * The plaintiff having predicated his case upon the Federal Employers' Liability Act must comply with its provisions, both with respect to the time of commencing the suit *and of bringing it in a court having jurisdiction to hear and determine it.*" (Emphasis supplied.)

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[10] 384 Ill. l. c. 242, 51 N. E. 2d l. c. 280, R. 28-29 in Case No. 24

Specification of Errors.

The Supreme Court of Illinois, in holding that petitioners could not maintain their respective actions in the Circuit Courts of that State, after changes of venue in such actions from the City Courts, erred in the following particulars:

(1) Error in failing and refusing to hold that the City Courts in which petitioners' respective actions were instituted, possessed, under the Illinois Venue Act, limited jurisdiction to change the venue of such actions to the Circuit Courts and thereby give continuity to the actions.

(2) Error in failing and refusing to hold that petitioners' respective actions were "commenced" within two years from the dates petitioners' respective causes of action accrued.

(3) Error in holding that recovery under the Federal Employers' Liability Act is conditioned not only upon the employee commencing his action within the two year period limited by that Act, but also upon his commencing his action within such time in a court having jurisdiction to hear and determine it; that is, that it is not enough for the action to be commenced within the time limited in a court having a limited jurisdiction over the action, but that it must be commenced in a court having full and complete jurisdiction.

(4) Error in failing and refusing to hold that, where an action under the Federal Employers' Liability Act is instituted, within two years from the day the cause of action accrued, in a State Court which was without jurisdiction to hear and determine the merits of the action but which had a limited jurisdiction to change the venue of such action to a court having complete jurisdiction thereover, the action is "commenced within two years from the day

the cause of action accrued," as required by Section 6 of the Federal Employers' Liability Act, even though the change of venue to the latter court takes place more than two years after the day the cause of action accrued.

(5) Error in discriminating against the rights of petitioners because such rights arose under Federal laws.

Summary of Argument.

The judgments, opinions and decisions of the Supreme Court of Illinois, here under review, are erroneous for the following reasons:

I.

Under the law of Illinois, where (as here) a suit, action or proceeding is commenced in a court of record, but in the wrong court because that court lacks jurisdiction over the parties or the subject matter, or both, the court nevertheless has a limited jurisdiction to change the venue to a proper court, and any of the parties is entitled, upon motion, to such a change of venue, irrespective of whether such motion is made before or after trial; and the taking of such a change of venue does not constitute commencement of a new action in the court to which the venue is changed, but constitutes merely one step or proceeding in the prosecution of the action commenced in the court from which the venue is changed.

Illinois Revised Statutes 1941, Chap. 146, § 36;
Illinois Revised Statutes 1941, Chap. 146, §§ 15, 16;
Illinois Revised Statutes 1941, Chap. 37, § 346;
Central Illinois Public Service Co. v. Industrial Commission, 293 Ill. 62, 127 N. E. 80;
Gill v. Lynch, 367 Ill. 203, 10 N. E. 2d 812.

II.

Petitioners' actions were "commenced" within two years from the days their respective causes of action accrued.

A. The question of when a suit is commenced in a State Court is a matter which the Federal courts recognize as

being controlled generally by the practice in the particular State.

Goldenburg v. Murphy, 108 U. S. 162, 2 S. Ct. 388, 27 L. Ed. 686;
Chesapeake & O. R. Co. v. DeAtley, 241 U. S. 310, 36 S. Ct. 564, 60 L. Ed. 1016;
Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211, 36 S. Ct. 595, 60 L. Ed. 961;
Act of April 8, 1908, c. 149, § 6, 35 Stat. 66, as amended by Act of April 5, 1910, c. 143, § 1, 36 Stat. 291; U. S. C. [1934 Ed.], Title 45, § 56.

B. Petitioners' actions were commenced on the days their respective complaints were filed in the City Courts of Illinois.

Illinois Revised Statutes 1937, Chap. 110, § 129;
Milwaukee Mechanics Ins. Co. v. Schallman, 188 Ill. 213, 59 N. E. 12;
Randall Dairy Co. v. Peevely Dairy Co., 278 Ill. App. 350;
Cohens v. Virginia, 6 Wheat. [19 U. S.] 264, 5 L. Ed. 257;
Illinois Revised Statutes 1941, Chap. 110, § 129.

C. Jurisdiction of the City Courts over the persons of respondents (defendants) was not essential to the "commencement" of petitioners' actions, but, had it been essential, it was obtained when respondents (defendants) entered their appearances and answered in the City Courts.

Kobeldein v. First National Bank of St. Elmo, 376 Ill. 450, 34 N. E. 2d 388;
Vincent v. McElrain, 304 Ill. 160, 136 N. E. 502;
Central Illinois Public Service Co. v. Industrial Commission, 293 Ill. 62, 127 N. E. 80;
Bates Manufacturing Co. v. United States, 303 U. S. 567, 58 S. Ct. 694, 82 L. Ed. 1020.

D. The changes of venue in petitioners' actions from the City Courts to the Circuit Courts, which took place more than two years after the causes of action accrued, do not affect the fact that such actions were commenced in the City Courts within the two-year period.

Authorities cited, supra.

III.

In ruling that recovery under the Federal Employers' Liability Act was conditioned not only upon the commencing of an action within two years from the day the cause of action accrued, but also upon commencing such action in a court having jurisdiction to hear and determine the same, the opinions and decisions of the Supreme Court of Illinois here under review have erroneously construed the requirements of Section 6 of that Act, and have erroneously ruled that a State Court is not required to exercise its jurisdiction over an action under the Act, contrary to principles enounced by this Court.

A. The Act does not expressly or impliedly make any such requirement as to the character of the power of the court in which the action is brought.

Act of April 8, 1908, c. 149, § 6, 35 Stat. 66, as amended by Act of April 5, 1910, c. 143, § 1, 36 Stat. 291; U. S. C. [1934 Ed.], Title 45, § 56.

B. The Act, being a remedial one, is to be liberally construed so as to advance the remedy proposed and correct the evils against which it was directed.

Jamison v. Encarnacion, 281 U. S. 635, 50 S. Ct. 440, 74 L. Ed. 1082.

C. A State Court having jurisdiction over an action

under the Act not only can, but must, exercise such jurisdiction.

Second Employers' Liability Cases [Mondou v. New York, N. H. & H. R. Co.], 223 U. S. 1, 32 S. Ct. 169, 56 L. Ed. 327;
McKnett v. St. Louis & S. F. R. Co., 292 U. S. 230, 54 S. Ct. 690, 78 L. Ed. 1227;
Miles v. Illinois Central R. Co., 315 U. S. 698, 62 S. Ct. 827, 86 L. Ed. 1129.

IV.

The effect of the opinions and decisions here under review is to discriminate between rights arising under Federal law and those arising under State law. A State may not discriminate against rights arising under Federal laws.

McKnett v. St. Louis & S. F. R. Co., 292 U. S. 230, 54 S. Ct. 690, 78 L. Ed. 1227.

ARGUMENT.

Although several incidental questions are raised in this Court on this record, there is only one basic question, namely: Whether an action under the Federal Employers' Liability Act, instituted within two years from the day the cause of action accrued, in a State Court which was without jurisdiction to hear and determine the merits of the action but which had a limited jurisdiction to change the venue of such action to a court having complete jurisdiction thereof, and the venue of which action was changed to such latter court more than two years after the cause of action accrued, is "commenced" within the requirements of Section 6 of the Federal Employers' Liability Act (Act of Apr. 22, 1908, c. 149, § 6, 35 Stat. 66, as amended by Act of Apr. 5, 1910, c. 143, § 1, 36 Stat. 291; 45 U. S. C. A. [1934 Ed.], § 56).

I.

Some prefatory discussion of several phases of Illinois law is necessary to a comprehensive understanding of the particular questions here involved.

The Circuit Courts in Illinois are courts of general original jurisdiction in civil cases (Constitution of Illinois of 1870, Art. VI, § 12).

The City Courts in that State are courts of record (Illinois Revised Statutes 1941, Chap. 37, § 333; East St. Louis Connecting Ry. Co. v. Enright, 47 Ill. App. 494). That such City Courts were courts of general jurisdiction in civil cases, having concurrent jurisdiction with the Circuit Courts within the City in such cases, for many years had been assumed (*Helmuth v. Bell* [1894], 150 Ill. 263, 37 N. E. 230; *Herb v. Pitcairn* [1941], 377 Ill. 405, 36 N. E. 2d 555), and on occasions expressly declared (*Baker v. Rockabrand*, 118 Ill. 365, 371, 8 N. E. 456; *Miller v. People*, 183 Ill. 422, 426, 56 N. E. 60; *Smith v. Herdlicka*, 323

Ill. 585, 590, 154 N. E. 414; *Knickerbocker Ice Co. v. Leyda*, 128 Ill. App. 66, 69; *Konow v. Nichols*, 128 Ill. App. 409, 413; *Torpedo Top Co. v. Royal Ins. Co.*, 162 Ill. App. 338, 340-341; *Swanson v. Moline R. I. & E. Trac. Co.*, 204 Ill. App. 144, 145-146; *Buchanan v. Scottish Union & Nat'l Ins. Co.*, 240 Ill. App. 523, 525). However, on March 16, 1942, in the cases of *Werner v. Illinois Central R. Co.*, 379 Ill. 559, 42 N. E. 2d 82, and *Mitchell v. Louisville & Nashville R. Co.*, 379 Ill. 522, 42 N. E. 2d 86, the Supreme Court of Illinois ruled, in substance and effect, that each of the City Courts in that State was without jurisdiction to hear and determine the subject matter of any action involving a cause of action arising outside the territorial limits of the City in which such court was located.

The Illinois statutes relating to the mechanics of a change of venue from one court to another are typical of such statutes generally. Illinois Revised Statutes 1941, Chap. 146, § 15, in so far as here relevant, provides:

> "In all cases of change of venue, the clerk of the court from which the change is granted shall immediately make out a full transcript of record and proceedings in the case, and of the petition, affidavits and order for the change of venue, and transmit the same, together with all the papers filed in the case, to the proper court: * * *. Such transcript and papers or copies may be transmitted by mail, or in such other way as the court or judge may direct."

while § 16 of that same chapter of the Illinois statutes further provides:

> "The clerk of the court to which the change of venue is granted shall file the transcript and papers transmitted to him and docket the cause, *and such cause shall be proceeded in and determined in all things, as well before as after judgment, as if it had originated in such court.*" (Emphasis supplied.)

With respect to changes of venue from the City Courts, Illinois Revised Statutes 1941, Chap. 37, § 346, in so far as here relevant, provides:

> "Change of venue from city courts, *for the same causes and in the same manner*, may be taken as from circuits courts, and the cases sent to any other city court, or to any circuit court, or to any other court of competent jurisdiction where the cause complained of does not exist." (Emphasis supplied.)

A remarkable statute upon change of venue is Illinois Revised Statutes 1941, Chap. 146, § 36 (sometimes referred to as the "Illinois Venue Act" or the "Venue Act of 1891"),[11] which provides:

> "That wherever any suit or proceeding shall hereafter be commenced, in any court of record in this State, and it shall appear to the court where the same is pending, that the same has been commenced in the wrong court or county, then upon motion of either or any of the parties to suit or proceeding, the court shall change the venue of such suit or proceeding to the proper court or county, and the same when the venue shall be so changed, shall be then pending and triable in such court or county to which the same shall be so changed the same as in other cases of change of venue: Provided, that where either party to such suit or proceeding shall procure the change of venue

[11] This statute, while remarkable, is not unique. Similar statutes or constitutional provisions for transfer of causes between appellate courts are found in Illinois (Illinois Revised Statutes 1941, Chap. 110, § 210), Georgia (Constitution of Georgia, Art. VI, Sec. II, Par. V), Louisiana (General Statutes of Louisiana, 1939, § 1427), Missouri (Revised Statutes of Missouri, 1939, § 2079) and Tennessee (Mitchie's Tennessee Code of 1938, § 10618), while similar statutes for transfer of causes between nisi prius courts are found in California (California Code of Civil Procedure, 1941, § 396), Connecticut (General Statutes of Connecticut, Revision of 1930, Vol. II, Chap. 288, § 5485), Massachusetts (Annotated Laws of Massachusetts, Vol. 7, c. 223, § 15), New Hampshire (Public Laws of New Hampshire, 1926, Chap. 334, §§ 8-9), New Jersey (Revised Statutes of New Jersey, 1937, 2:26-60 et seq.), New York (New York Civil Practice Act, § 110), Texas (Vernon's Texas Statutes, 1936, Art. 8307a), and Wisconsin (Wisconsin Statutes, 1931, § 269.52). A table of cases in which these latter statutes are construed is attached as an Appendix to this

as herein provided for, that the court shall require the plaintiff in said suit to pay all costs in such suit or proceeding, up to and including the costs of the change of venue except such costs, if any there are, as shall have been made or occasioned by answer to the merits and a trial thereon, if any such shall have been had or made, and such costs, if any, caused by answer to the merits and trial thereon shall abide the final result of such suit or proceeding the same as in other cases of change of venue."

This last quoted statute was construed and applied by the Supreme Court of Illinois in *Central Illinois Public Service Co. v. Industrial Commission*, 293 Ill. 62, 127 N. E. 80. That case involved a certiorari proceeding to review an award of the Illinois Industrial Commission under a statute which required that such proceeding be "commenced" within twenty days after the decision of the Industrial Commission and in the Circuit Court of the County in which the defendant might be found. B. L. Kirk, the administrator of the deceased employee, was the defendant, and lived and could be found only in Champaign County. Despite this, the certiorari proceeding was commenced in the Circuit Court of Coles County, but within the statutory period. Kirk was served with notice by mail as provided by the statute, but entered only a special appearance to contest the jurisdiction of the Circuit Court of Coles County. Various proceedings in the case were had, and, some six months after the action had been commenced, a motion was filed by the plaintiff, under the Illinois Venue Act (now Illinois Revised Statutes 1941, Chap. 146, § 36), for a change of venue to the Circuit Court of Champaign County. This motion for change of venue was granted on the same day it was filed, and the mechanics of the change of venue were completed. Kirk then entered his special appearance in the Circuit Court of Champaign County and moved to quash the writ of

certiorari upon the grounds that the proceeding had not been commenced within the time limited by statute, that the Circuit Court of Coles County never acquired jurisdiction, and that the Circuit Court of Champaign County, therefore, never acquired jurisdiction upon the change of venue being made. The trial court sustained this motion and dismissed the writ of certiorari. On appeal from this ruling, the Supreme Court of Illinois said:

> "* * * the circuit court of Coles county did not have jurisdiction either of the person of the administrator or the subject matter of the suit" (127 N. E., l. c. 82).

but in reversing the ruling of the trial court, in holding that the case properly had been commenced and transferred to the Circuit Court of Champaign County on change of venue, and in remanding the case for a trial upon the merits in that court, the Supreme Court of Illinois said (127 N. E., l. c. 82):

> "* * * it is evident that by the use of the term 'commenced in the wrong court or county,' *the Legislature intended to reach those cases begun in courts not having jurisdiction of the subject matter as well as those where jurisdiction of the parties, alone, is lacking.* This is a provision of the law evidently enacted for the purpose of simplifying procedure and preventing the loss of substantial rights through a misunderstanding as to what forum should be used to obtain such rights. *By this act it is evident that the Legislature intended to and did confer on all courts of record in this state, without regard to any other jurisdiction either conferred upon or denied it by common law or statute, jurisdiction to 'change the venue of such suit or proceeding to the proper court or county.'* It cannot be doubted that the power to confer that limited jurisdiction lies within the powers of the Legislature, and we are of the opinion that in

the instant case, while the circuit court of Coles county had no jurisdiction of the subject-matter involved for any other purpose than that defined in the Venue Act of 1891 and could therefore enter no order affecting the rights of the parties under the award made, that court was by said act empowered to transfer the cause to the proper county, which in this case was Champaign county, and under said act when said transfer was made the cause was from that time forward pending in the circuit court of Champaign county." (Emphasis supplied.)

In *Gill v. Lauch*, 367 Ill. 203, 10 N. E. 2d 812, an action for a receiver had been brought in an Illinois County Court under a statute commonly known as the "Skarda Act," and a receiver was appointed. Subsequently, the Supreme Court of Illinois held that the Skarda Act was unconstitutional, and that the County Courts had no jurisdiction over the appointment of receivers. Thereafter, the case was transferred on change of venue, under the Illinois Venue Act, to the Circuit Court of Cook County, and the Illinois Supreme Court, in affirming this transfer on change of venue, cited and confirmed the doctrine enounced in *Central Illinois Public Service Co. v. Industrial Commission, supra*, and said (10 N. E. 2d, l. c. 814):

"These holdings conclusively demonstrate that the county court had no jurisdiction to hear a petition for appointment of a receiver or for any purpose *except to transfer the cause to the proper court.* The appointments, and all subsequent orders, except that transferring the cause, being void, *the cause therefore went to the circuit court with the petitions for appointment of a receiver still pending and undetermined.*" (Emphasis supplied.)

Thus, in that case, while it denied validity to those intermediary proceedings in the County Court only, between summons and transfer, which the County Court was with

out jurisdiction to take, the Supreme Court of Illinois sustained the commencement of the suit in the County Court and the subsequent proceedings to transfer the case to the Circuit Court, and recognized the power of the County Court to give, by the limited jurisdiction vested in it under the Illinois Venue Act, continuity to the proceedings commenced therein.

From the foregoing statutes and authorities it appears that, under the law of Illinois:

(a) Irrespective of any other jurisdiction conferred upon or denied it, every court of record in Illinois—including the various City Courts—has a limited jurisdiction over every suit or proceeding, commenced or pending therein, empowering such court upon application of any party to change the venue of such suit or proceeding to the proper court or county.

(b) The institution of a suit or proceeding in a court of record within the time required by law, even though the suit or proceeding be instituted in a court which does not have jurisdiction over the parties defendant or the subject matter of the suit, or both, constitutes the "commencement" of the action within the time required by law, by reason of the limited jurisdiction of the court to transfer the cause to the proper court or county by a change of venue.

(c) The matter of effecting a change of venue of a suit under the Illinois Venue Act, from a court of record which is without full jurisdiction (i. e., the "wrong court") to a court which has full jurisdiction (i. e., the "proper court") does not constitute the "commencement" of the action in the latter court, but constitutes merely one of the proceedings in the prosecution of the action which was "commenced" in the former court.

The opinions of the Supreme Court of Illinois hereunder review do not in the slightest degree affect what has

just above been said. The opinion in petitioner Herb's case (which controlled the opinion and decision in petitioner Belcher's case as well) cites and reaffirms the decisions in *Central Illinois Public Service Co. v. Industrial Commission, supra*, and *Gill v. Lynch, supra*, but seeks to distinguish them by saying:[12]

> "The distinction to be drawn is that *if a case is improperly filed in a court having jurisdiction of the cause generally but without its territorial jurisdiction, it may be transferred to the proper circuit court.* But, if the cause is filed in a court which could never lawfully acquire jurisdiction, the transfer to a court which would have had jurisdiction gives no validity to the proceedings in the first court." (Emphasis supplied.)

Whatever this pronouncement may mean[13] it is clear that petitioners' cases come within the first sentence of it. Had the petitioners' causes of action arisen within the territorial limits of the respective cities in the City Courts in which petitioners instituted their actions, those courts would have had full and complete jurisdiction over those actions.[14] It was only the "territorial" feature of petitioners' actions which prevented the City Courts from having complete and general jurisdiction of those causes. Those causes were, therefore, "improperly filed in a court having jurisdiction of the cause generally but without its territorial jurisdiction," and were, therefore, causes which "may be transferred to the proper circuit court" under the above quoted language.

Thus, it is manifest that under the established law of Illinois, recognized and approved in the decisions and opinions here under review, the City Courts in which peti-

12 384 Ill. 1 c. 246, 51 N. E. 2d 1 c. 282, R. 32 in Case No. 24.

13 Compare discussion of petitioners' cases in Illinois Bar Journal (May, 1944), Vol. 32, No. 9, pp. 347 et seq.

14 Compare Popp v. Terminal R. Ass'n of St. Louis, 316 Ill. App. 67, 45 N. E. 2d 299.

tioners' respective actions were instituted possessed, under the Illinois Venue Act, limited jurisdiction to change the venue of such actions to the circuit courts, and thereby give continuity of those actions by transferring them to the courts having full and complete jurisdiction thereover.

II.

In view of the well-settled doctrines, that in actions brought in a State Court the Federal Courts will follow the practice of the State in determining when an action is commenced (*Goldenburg v. Murphy*, 108 U. S. 162, 2 S. Ct. 388, 27 L. Ed. 686), and that the practice and procedure in actions brought under the Federal Employers' Liability Act in a State Court will be governed by the law of the State in which such court is located (*Chesapeake & O. R. Co. v. DeAtley*, 241 U. S. 310, 317, 36 S. Ct. 564, 60 L. Ed. 1016; *Minneapolis & St. L. R. Co. v. Bombolis*, 241 U. S. 211, 36 S. Ct. 595, 60 L. Ed. 961), there can be little room for doubt about the applicability of the Illinois doctrines which we have just above discussed in determining whether the case at bar was "commenced" within the time required by Section 6 of the Federal Employers' Liability Act (Act of April 8, 1908, c. 149, § 6, 35 Stat. 66, as amended by the Act of April 5, 1910, c. 143, § 1, 36 Stat. 291; U. S. C. [1934 Ed.], Title 45, § 56), which, in so far as here relevant, provides:

> "No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued * * *. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States. * * *."

Petitioner Herb's cause of action accrued at Decatur, Illinois, on the date of his injury, November 23, 1936. On De-

cember 22, 1937, as plaintiff, he filed in the City Court of Granite City, Illinois, his complaint alleging a cause of action under the Federal Employers' Liability Act, and had a summons issued out of that court for the respondents Pitcairn and Nicodemus, in their capacities as receivers, as defendants (R. 5 9 in Case No. 24). Petitioner Belcher's cause of action accrued at Nashville, Tennessee, on February 15, 1939, and on June 22, 1940, as plaintiff, he filed in the City Court of East St. Louis, Illinois, his complaint alleging a cause of action under the Federal Employers' Liability Act, and had a summons issued out of that court for the respondent Louisville & Nashville Railroad Company, as defendant (R. 1 4 in Case No. 25). Thus, petitioners' respective actions were "commenced" well within "two years from the day the cause of action accrued" whether such actions be said to be "commenced" when the process (summons) was issued, as was the rule at common law and under the Illinois Civil Practice Act prior to its amendment on July 6, 1937 (*Cohens v. Virginia*, 6 Wheat. [19 U. S.] 264, 408, 5 L. Ed. 257, 292; Illinois Revised Statutes 1937, Chap. 110, § 129; *Milwaukee Mechanics Ins. Co. v. Schallman*, 188 Ill. 213, 220, 59 N. E. 12; *Randall Dairy Co. v. Peerly Dairy Co.*, 278 Ill. App. 350, 351), or when the complaints were filed, as is the rule under the Illinois Civil Practice Act since its amendment in 1937 (Illinois Revised Statutes 1941, Chap. 110, § 129).

As previously indicated (ante, p. 11), it is suggested in the opinion of the Supreme Court of Illinois that although the City Courts might be deemed to have a limited jurisdiction to grant changes of venue to the proper courts under the Illinois Venue Act, these courts did not acquire jurisdiction over the persons of the respondents (defendants) by virtue of the summonses issued out of such courts. The fact is, however, that the City Courts acquired jurisdiction over the persons of respondents well within the two year period provided for by Section 6 of the Federal

Employers' Liability Act, wholly irrespective of the validity of the summonses, when the respondents appeared generally and filed their answers in those courts within two years after petitioners' respective causes of action had accrued (R. 9-13 in Case No. 24; R. 5-11 in Case No. 25), under which circumstances the issuance and service of summons were not essential to the commencement of the actions (*Koberlein v. First National Bank of St. Elmo*, 376 Ill. 450, 34 N. E. 2d 388). Furthermore, the question of when petitioners' actions were "commenced" was and is not dependent upon the acquisition of jurisdiction of the persons of respondents, for, as was said in *Vincent v. McElvain*, 304 Ill. 160, 136 N. E. 502, 503:

> "It is well established by repeated decisions of this and other courts that a suit or action is commenced when a party puts in motion, under his claim, the instruments of the court. * * * *We know of no authority which holds that a suit is not commenced until the court gets jurisdiction of the defendant.*" (Emphasis supplied.)

To this same effect are the decisions in *Central Illinois Public Service Co. v. Industrial Commission*, *supra*, and *Bates Manufacturing Co. v. United States*, 303 U. S. 567, 58 S. Ct. 694, 82 L. Ed. 1020. In this connection, too, there should not be overlooked the amendment of July 6, 1937, to the Illinois Civil Practice Act (Laws of Illinois 1937, p. 989; Illinois Revised Statutes 1941, Chap. 110, ¶ 129), providing, in so far as here relevant, that:

> "Every civil action, unless otherwise expressly provided by statute shall be commenced by the filing of a complaint."

After the pleadings had been made up in petitioners' cases in the City Courts, the petitioners prosecuted their actions with due diligence, and it was only due to the

decisions of the Illinois Supreme Court some years later in *Werner v. Illinois Central R. Co., supra*, and *Mitchell v. Louisville & Nashville R. Co., supra*, that the jurisdiction of the City Courts over petitioners' actions was determined to be limited, so as to require changes of venue to the Circuit Courts. Effecting those changes of venue did not, under applicable Illinois law, constitute a dismissal of petitioners' actions in the City Courts and the commencement of such actions in the Circuit Courts, but, on the contrary, constituted merely another step or proceeding in the prosecution of those actions. The City Courts were not wholly without jurisdiction of petitioners' actions, although the jurisdiction of such courts over those actions was a limited one—limited to the granting of a change of venue to courts having full jurisdiction. The fact that such changes of venue took place more than two years after the petitioners' causes of action accrued is immaterial in determining whether such actions were "commenced" within two years from the day the causes of action accrued, because the Illinois Venue Act imposes no time limit upon transfers of pending suits, but, on the contrary, by providing for transfers either before or after trial, clearly indicates an intention that such transfers can be made at any time without affecting the time of "commencement" of the suits.

Any concept that, under Illinois law, these petitioners' suits were "commenced" by and as of the dates of the changes of venue to the Circuit Courts, instead of by and as of the dates of the filing of petitioners' respective complaints in the City Courts, is dispelled by the unmistakable language of the Illinois Venue Act. In that Act, which is quoted at page 21 of this brief, reference is made twice to "commencement" of the action in the wrong court, and no reference is made therein to any commencement of the action in the proper court. Furthermore, it is said in that Act that after the change of venue is made

from the wrong court to the proper court, the suits shall then be pending and triable in the proper court "the same as in other cases of change of venue." In no other case of change of venue, if suit is commenced in proper time in the first venue, does the transfer by change of venue in any way affect the time of the "commencement" of the suit.

Thus, it becomes clear that, in any view of the matter, petitioners' respective actions were, under the established law of Illinois, "commenced" within two years from the days upon which the petitioners' respective causes of action accrued.

III.

The Supreme Court of Illinois, notwithstanding the matters hereinbefore discussed, ruled that petitioners' actions were not commenced within two years after their causes of action accrued, as required by Section 6 of the Federal Employers' Liability Act, basing such ruling upon its interpretation of that Act as follows:

> "* * * we observe recovery under the Federal Employers' Liability Act is conditioned upon two things: (1) commencing an action within two years from the date of the injury; and (2) *commencing such action in a court having jurisdiction to hear and determine the same.* * * * The plaintiff having predicated his case upon the Federal Employers' Liability Act must comply with its provisions, both with respect to the time of commencing the suit *and of bringing it in a court having jurisdiction to hear and determine it.*" (Emphasis supplied.)

We submit that Section 6 of the Liability Act does not require that actions thereunder, in order to comply with the requirement relating to the time within which they must be commenced, must be commenced within that time in a court having jurisdiction to hear and determine the

merits of the action—that is to say, full and complete jurisdiction over the cause. There is no specific language in that section of the Act making, or even suggesting, any such requirement as to the character of the power of the Court in which the action is brought, and so far as we have been able to determine neither this Honorable Court nor any other Federal court has interpreted this section to contain such a requirement.

On the contrary, the implications from the decisions of this Court construing this Act clearly indicate that this section should not be so narrowly construed as the Supreme Court of Illinois has construed it. The Act is a remedial one, and, like all remedial legislation, should be liberally construed so as to advance the remedy proposed and correct the evils against which it was directed (*Jamison v. Encarnacion*, 281 U. S. 635, 640, 50 S. Ct. 440, 74 L. Ed. 1082). Section 6 of the Act does not vest in the State Courts concurrent jurisdiction with the Federal Courts over actions under the Act, but, conversely, vests in the Federal Courts "concurrent jurisdiction with that of the courts of the several States" over such actions. It is familiar doctrine that, in the absence of a constitutional or a statutory restriction of jurisdiction over an action or proceeding to the Federal Courts or tribunals, the courts of the several States have jurisdiction to enforce rights arising under the Constitution and laws of the United States (*Cohens v. Virginia*, 6 Wheat. [19 U. S.] 264, 396, 397, 5 L. Ed. 257; *Claflin v. Houseman*, 93 U. S. 130, 136, 23 L. Ed. 833; *Robb v. Connolly*, 111 U. S. 624, 637, 4 S. Ct. 544, 28 L. Ed. 542; *United States v. Bank of New York & Trust Co.*, 296 U. S. 463, 479, 56 S. Ct. 343, 80 L. Ed. 331), and in line with this doctrine it is held that, where an action under the Federal Employers' Liability Act is brought in a State Court which has jurisdiction

v. New York, N. H. & H. R. Co.], 223 U. S. 1, 32 S. Ct. 169, 56 L. Ed. 327; *McKnett v. St. Louis & S. F. R. Co.*, 292 U. S. 230, 54 S. Ct. 690, 78 L. Ed. 1227; *Miles v. Illinois Central R. Co.*, 315 U. S. 698, 62 S. Ct. 827, 86 L. Ed. 1129).

It necessarily conflicts with and narrows these principles to construe Section 6 of the Federal Employers' Liability Act as the Supreme Court of Illinois did construe it, so as to require that an action brought in a State Court under the Act, in order to meet the requirements of that section as to the time within which the action can be commenced, not only must be brought within such time, but also must be brought in a court having jurisdiction to hear and determine the merits of the action. The effect of the decision of the Supreme Court of Illinois in this case is to rule that a State Court having a limited jurisdiction over an action under the Federal Employers' Liability Act is not under a duty to exercise that limited jurisdiction.

To uphold the construction placed upon Section 6 of the Federal Employers' Liability Act by the Supreme Court of Illinois necessarily would result in an anomalous doctrine that a State Court having a limited jurisdiction over an action to enforce a federal right would not be obliged to exercise that limited jurisdiction, while a State Court having full jurisdiction over the action would be compelled to exercise its jurisdiction thereover.

The Supreme Court of Illinois has, we submit, manifestly erred in construing Section 6 of the Federal Employers' Liability Act in such manner as to make it impose a requirement that employees' suits be commenced in a court having jurisdiction to hear and determine such suits. The only requirement of that Act is that such suits be commenced in a Federal or State Court within two years. Mention is made in the Act of a State Court of competent

moval. The construction placed upon Section 6 of the Act by the Supreme Court of Illinois has deprived these petitioners of their rights under that Act.

IV.

Furthermore, the effect of the decision of the Supreme Court of Illinois in these cases is, in view of its decisions in *Central Illinois Public Service Co. v. Industrial Commission, supra*, and *Gill v. Lynch, supra*, to discriminate between rights accruing under the Federal Employers' Liability Act and rights accruing under State laws. It plainly appears from those decisions that, if petitioners' causes of action had accrued under the laws of Illinois, petitioners' actions would have been held to have been "commenced" within two years from the day the causes of action accrued.

> "The plaintiff is cast out because he is suing to enforce a federal act. A state may not discriminate against rights arising under federal laws" (McKnett v. St. L. & S. F. R. Co., 292 U. S., l. c. 234).

Conclusion.

Petitioners here recognize the invalidity of the trials had in their cases in the City Courts, in the light of the decisions in *Werner v. Illinois Central R. Co., supra*, and *Mitchell v. Louisville & Nashville R. Co., supra*, and recognize that all proceedings in the said City Courts between the commencement of their suits and the changes of venue to the Circuit Courts, were void.[15] From what we have heretofore said, however, petitioners submit that it clearly appears that their actions were "commenced," within two years from the day their respective causes of action accrued, in courts which had limited jurisdiction over the

venue of the actions to courts having full jurisdiction thereover; that, under the applicable doctrines and decisions of this Court, as well as of the courts of Illinois, it was not only the right, but the duty, of the courts in which petitioners' actions were instituted to exercise their limited jurisdiction over the actions by changing the venue thereof to the proper courts; that effecting the changes of venue did not constitute a dismissal of the actions in the City Courts and the commencement of new actions in the Circuit Courts; and that petitioners' actions were "commenced" within the time required by Section 6 of the Federal Employers' Liability Act, notwithstanding that the changes of venue in the actions, from the courts having limited jurisdiction over those actions to the courts having full jurisdiction thereover, took place after the time limited by that section for the commencement of the actions.

It follows that the Supreme Court of Illinois was in error in ruling to the contrary, and petitioners, therefore, respectfully submit that the judgments and opinions of the Supreme Court of Illinois here under review should be reversed, and that these causes should be remanded, in order that petitioners may have a trial of their respective actions upon the merits, in the courts having jurisdiction to hear and determine the same.

Respectfully submitted,

ROBERTS P. ELAM,
Counsel for Petitioners.

MARK D. EAGLETON and
JOSEPH B. McGLYNN,
Of Counsel.

APPENDIX

(consisting of a list of cases interpreting the statutes of various states, other than Illinois, relating to transfer to the proper courts of cases commenced in the wrong courts).

Goldie v. Superior Court, 13 Cal. App. 2d 12, 56 P. 2d 261;

Bershon v. Municipal Court, 5 Cal. App. 2d 519, 42 P. 2d 649;

Bartlett v. Lee, 60 N. H. 168;

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Langdell v. Eastern Basket & Veneer Co., 78 N. H. 243, 99 A. 90;

Commonwealth Roofing Co. v. Riccio, 81 N. J. Eq. 486, 87 A. 114;

Luther v. Silver, 223 N. Y. S. 468, 130 Misc. 21;

Deal v. Zarelli Realty Corp., 265 N. Y. S. 845, 148 Misc. 865;

DeLisa v. Tritaglia Constr. Co., 266 N. Y. S. 798, 149 Misc. 532;

Marcus v. Bader, 282 N. Y. S. 503, 156 Misc. 730;

Lloyds Cas. Co. of N. Y. v. Lem (Tex. Civ. App.), 62 S. W. 2d 497;

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

VICTOR J. HERB,
Petitioner,
v.
NORMAN B. PITCAIRN and FRANK C. NICODEMUS, JR., Receivers for Wabash Railway Company, a Corporation,
Respondents.

No. 24.

BENJAMIN F. BELCHER,
Petitioner,
v.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, a Corporation,
Respondent.

No. 25.

On Certiorari to the Supreme Court of the State of Illinois.

PETITIONERS' REPLY BRIEF.

ROBERTS P. ELAM,
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Montgomery v. Equitable Life Assur. Society, 7 Cir., 83 Fed. 2d 758, 761 10

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

VICTOR J. HERB, Petitioner, v. NORMAN B. PITCAIRN and FRANK C. NICODEMUS, JR., Receivers for Wabash Railway Company, a Corporation, Respondents.	No. 24.
BENJAMIN F. BELCHER, Petitioner, v. LOUISVILLE & NASHVILLE RAILROAD COMPANY, a Corporation, Respondent.	No. 25.

On Certiorari to the Supreme Court of the State of Illinois.

PETITIONERS' REPLY BRIEF.

As we understand it, it is the position of the respondents that the decisions here under review

(1) do not involve any federal question decisive thereof,

(2) rest entirely upon non-federal grounds, and

(3) in any event are correctly decided.

The Federal Question Involved.

At pages 11-12 of our original brief herein, we pointed out that the real basis for the opinions and decisions here under review was that the terms of Section 6 of the Federal Employers' Liability Act required not only that an employee's action under the Act be brought within the time specified in that section, but, also, that the suit be brought within that time "in a court having jurisdiction to hear and determine it" — that is to say, a court having full and complete jurisdiction of the action.

The respondents fully agree with our position, for, at page 5 of their brief, they say:

> "The opinion and decision of the Supreme Court of Illinois was based largely upon petitioner's (plaintiff's) failure to 'commence' his suit *in a court of competent jurisdiction* within two years after sustaining his injuries, *as required by Sec. 6 of the Federal Employers' Liability Act*, * * *." (Emphasis supplied.)

Throughout respondents' brief, the words "a court of competent jurisdiction," emphasized by us in the foregoing quotation, are treated as the equivalent of, and used interchangeably with, the words "a court having jurisdiction to hear and determine the action," or the words "a court of competent jurisdiction to hear and determine the subject-matter of the controversy" — i. e., a court having full and complete jurisdiction of the action.

Clearly, the determination of the requirements of Section 6 of the Federal Employers' Liability Act for the maintenance of employees' actions under that Act — which determination respondents concede was the basis for the opinions and decisions below — involves a federal question, for such a determination involves the construction of that section of the Federal Act and the determination of the respective rights of the parties thereunder. (Cf. *Wilson v. Illinois Central R. Co.*, 315 U. S. 698, 62 S.

Ct. 827, 86 L. ed. 1129; *Baltimore & Ohio R. Co. v. Kepner*, 314 U. S. 44, 62 S. Ct. 6, 86 L. Ed. 28; *Seaboard Air Line R. Co. v. Horton*, 233 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062; *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 34 S. Ct. 305, 58 L. Ed. 591; *Davis v. Packard*, 6 Pet. [31 U. S.] 41, 8 L. Ed. 312; *Ross v. Doe ex dem. Barland*, 1 Pet. [26 U. S.] 655, 7 L. Ed. 302.)

That the determination of this federal question by the Supreme Court of Illinois in the instant case makes it the duty of this Court to pass upon these cases appears plain from the decision in *North Carolina R. Co. v. Zachary*, *supra*, wherein it was said (34 S. Ct., l. c. 307-308):

> "* * * since it appears that defendant expressly claimed immunity by reason of the act of Congress, and the highest court of the state either decided or assumed that the record sufficiently presented a question of Federal right, and decided against the party asserting that right, the decisions of this court render it clear that it is our duty to pass upon the merits of the Federal question."

It is, we believe, plainly apparent from the opinions and decisions here under review that, in the final analysis, they are based primarily upon the Illinois Supreme Court's construction of Section 6 of the Federal Employers' Liability Act, which construction is, we submit, erroneous in that it requires, in addition to the requirement of the Act that an employee's suit be commenced within two years after his cause of action accrued, a further requirement, not provided for in the Act, that his suit be brought within that time in a court having jurisdiction to hear and determine it.

The Non-Federal Questions Involved.

It is true that these cases involve, in addition to the above mentioned federal question, some non-federal questions such as (a) the question of when, under Illinois law,

an action is deemed "commenced," (b) questions relating to the jurisdiction of various of the courts of the State of Illinois, and (c) the power to grant changes of venue, and the effect of changes of venue, in the Illinois courts.

These non-federal questions, however, are not such that their determination affords independent grounds for the decisions now under review. The determination of whether the actions now before this Court were commenced in the Illinois courts within the requirements of Section 6 of the Federal Employers' Liability Act—which was the matter determined by the Supreme Court of Illinois—involves not only these non-federal questions, but involves as well the federal question as to what are the requirements of that section of the federal law. The federal and non-federal questions are so intermingled, interwoven and interdependent that a decision of these cases necessarily involves a determination of both types of questions. This is manifest from the language of the Supreme Court of Illinois where, in stating the question presented to, and to be decided by, it, that Court said:[1]

> "The material point for consideration is whether the plaintiff has commenced an action within two years of the date of his injury *in a court having jurisdiction to hear and determine the same, as required by section 6 of the Federal Employers' Liability Act*, by transferring the cause from a court having no jurisdiction over it at a date which, if then originally filed in the latter court, could not be maintained because not filed within the statutory time" (emphasis supplied).

and where in arriving at its decision, that Court further said:[2]

> "* * * we observe recovery under the Federal Employers' Liability Act is conditioned upon two things: (1) commencing an action within two years

[1] 384 Ill. 1, c. 240-241, 51 N. E. 2d, 1, c. 279, R. 27 in Case No. 24

[2] 384 Ill. 1, c. 242, 51 N. E. 2d, 1, c. 280, R. 28-29 in Case No. 24

from the date of the injury; and (2) *commencing such action in a court having jurisdiction to hear and determine the same.* * * * The plaintiff having predicated his case upon the Federal Employers' Liability Act must comply with its provisions, both with respect to the time of commencing the suit *and of bringing it in a court having jurisdiction to hear and determine it.*" (Emphasis supplied.)

The applicable principles relating to this Court's jurisdiction under these circumstances are well stated in *Enterprise Irrigation Dist. v. Farmers Mutual Canal Co.*, 243 U. S. 157, 37 S. Ct. 318, 320-321, 61 L. Ed. 644, as follows:

"Thus we are concerned with a judgment placed upon two grounds, one involving a Federal question and the other not. In such situations our jurisdiction is tested by inquiring whether the non-Federal ground is independent of the other and broad enough to sustain the judgment. Where this is the case, the judgment does not depend upon the decision of any Federal question and we have no power to disturb it. * * * But where the non-Federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain. * * * And this is true also where the non-Federal ground is so certainly unfounded that it properly may be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the Federal question." (Authorities cited are omitted.)

In *Ward v. Board of County Commissioners*, 253 U. S. 17, 22-23, 40 S. Ct. 419, 421, 64 L. Ed. 751, this Court in this connection further said:

"The right to the exemption was a federal right, and was specially set up and claimed as such in the petition. Whether the right was denied, or not given due recognition, by the Supreme Court is a question

as to which the claimants were entitled to invoke our judgment, and this they have done in the appropriate way. It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward nonfederal grounds of decision that were without any fair or substantial support. * * * Of course, if nonfederal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided. * * * With this qualification, it is true that a judgment of a state court, which is put on independent nonfederal grounds broad enough to sustain it, cannot be reviewed by us. But the qualification is a material one and cannot be disregarded without neglecting or renouncing a jurisdiction conferred by law and designed to protect and maintain the supremacy of the Constitution and the laws made in pursuance thereof." (Authorities cited are omitted.)

In Any Event, Non-Federal Grounds Utilized as a Basis for the Opinions and Decisions Below Are Plainly Untenable and Without Any Fair or Substantial Support, and, Therefore, Cannot Serve to Defeat Review.

We submit that, even if the opinions and decisions of the Supreme Court of Illinois now under review could be said to be based upon independent non-federal grounds (which we do not, by any means, intend to concede), still, those grounds are so certainly unfounded as to be regarded as arbitrary, as a mere device to prevent review by this Court, and as discriminating against the rights of petitioners merely because those rights arose under federal law.

The respondents' contentions, that the decisions and judgments of the Supreme Court of Illinois now under review are correct and right, are based primarily upon the statement at page 41 of respondents' brief to the effect that

> "In 14 Am. Jur., Sec. 167, p. 367, it is said that a universal principle, as old as the law, is that the proceedings of a court without jurisdiction are a nullity, and its judgment without effect, either on the person or property, and that *a court without jurisdiction over the subject matter of a particular case can only dismiss the case for want of jurisdiction and possesses no other power or authority.*" (Emphasis supplied.)

Upon this major premise, and upon the further premise that the Illinois City Courts had no jurisdiction "to hear and determine" petitioners' causes of action, respondents contend that the Illinois City Courts had no jurisdiction, limited or otherwise, which authorized the "commencement" of petitioners' actions in such courts and subsequent transfer of such actions, by change of venue, to courts having jurisdiction to hear and determine them.

In the absence of the Illinois Venue Act (Illinois Revised Statutes, 1941, Chap. 146, § 36), there would be little room for doubt about the correctness of respondents' position and contentions. That Act, however, destroys the common law principle which constitutes the major premise of respondents' position, and vests in every court of record in the State of Illinois (including the City Courts) a limited jurisdiction to change the venue of every action commenced therein to the proper court or county for its determination. The plain language of that Venue Act, so far as here material, provides:

> "That *wherever any suit or proceeding* shall hereafter be commenced, *in any court of record* in this State, and it shall appear to the court where the same is pending, that the same *has been commenced in the wrong court or county*, then, upon motion of either or any of the parties to such suit or proceeding, *the court shall change the venue of such suit or proceeding to the proper court or county*, and the same, when the venue shall be so changed, shall be then pending

> and triable in such court or county to which the sam
> shall be so changed the same as in other cases
> change of venue." (Emphasis supplied.)

The plain effect of the Illinois Venue Act was stated b
the Supreme Court of Illinois, in *Central Illinois Publ
Service Co. v. Industrial Commission*, 293 Ill. 62, 12
N. E. 80, 82, as follows:

> "By this act it is evident that the legislature in
> tended to and did confer *on all courts of record
> this state*, without regard to any other jurisdictio
> either conferred upon or denied it by common law o
> statute, *jurisdiction to 'change the venue of such sui
> or proceeding to the proper court or county.'* It can
> not be doubted that the power to confer that *limite
> jurisdiction* lies within the powers of the legisla
> ture. * * *." (Emphasis supplied.)

The decision in the case last quoted from was cited, ap
proved and followed in *Gill v. Lynch*, 367 Ill. 203, 10 N. E
2d 812, and the Court below, in its opinion in petitioner
Herb's case, which also controlled the decision in peti
tioner Belcher's case, recognized and made no criticism of
*those two earlier decisions which had held valid the com
mencement of actions in courts of record which had no
jurisdiction to hear and determine them, and the transfer
of such actions, by change of venue under the Illinois
Venue Act, to the courts having jurisdiction to hear and
determine them.*

At various places in their brief, respondents make an
assertion, the effect of which is stated at page 47 of their
brief as follows:

> "* * * the Supreme Court of Illinois has con
> sistently held that *no jurisdiction of any kind* could
> constitutionally be granted to a City Court in a suit
> arising outside of the limits of the city in which such
> City Court is held." (Emphasis supplied.)

The cases relied upon by respondents in this connection (*Werner v. Illinois Central R. Co.*, 379 Ill. 559, 42 N. E. 2d 82; *Mitchell v. Louisville & N. R. Co.*, 379 Ill. 522, 42 N. E. 2d 86; *Smith v. Louisville & N. R. Co.*, 381 Ill. 55, 44 N. E. 2d 841) do not go nearly so far as respondents' assertion, and do no more than to hold that the Illinois Constitution prohibits the City Courts in that state from having original jurisdiction to "hear and determine" causes of action arising outside the respective cities. The power of the Legislature to confer upon the City Courts, along with all other courts of record in Illinois, a limited jurisdiction to change the venue to the proper court when the City Court is the wrong court for the determination of actions commenced therein, was expressly declared in *Central Illinois Public Service Co. v. Industrial Commission, supra*, just above quoted. Furthermore, respondents' assertion is in direct conflict with the recent decision of the Illinois Supreme Court in *Moffett v. Green*, 386 Ill. 318, 53 N. E. 2d 941, in which it was held that the City Courts have appellate jurisdiction over judgments of Justices of the Peace within the township, though the causes of action arose outside the limits of the township and city, and though the cases are tried de novo on appeal in the City Courts.

It is suggested by respondents, at pages 48 and 49 of their brief, that the Supreme Court of Illinois in *Central Illinois Public Service Co. v. Industrial Commission, supra*, and *Gill v. Lynch, supra*, did no more than to hold that the Illinois Venue Act, as applied to the circuit courts of that state—courts of general jurisdiction—authorized transfer to a proper circuit court of any suit commenced in the wrong circuit court because outside its territorial jurisdiction; that the Illinois Venue Act is not applicable to courts of special or limited jurisdiction (such as the City Courts), and does not vest in such courts a limited jurisdiction to transfer to the proper court an

action commenced in the wrong court; and that the Supreme Court of Illinois, in the cases now under review, did no more than to follow the earlier decisions in those regards.

The difficulty with these suggestions is manifold.

In the first place, the Illinois Venue Act is not limited in its application to courts of general jurisdiction. By express terms, it applies to "any court of record," including courts of record of special or limited jurisdiction, as well as courts of record of general jurisdiction, and, therefore, including the Illinois City Courts. This is plainly demonstrated, not only by the language of the opinion in *Central Illinois Public Service Co. v. Industrial Commission, supra*, but by the facts in that case, and the facts in *Gill v. Lynch, supra*.

Central Illinois Public Service Co. v. Industrial Commission, supra, involved a **statutory** certiorari proceeding commenced in a circuit court to review an award under the Illinois Workmen's Compensation Act, and the Supreme Court of Illinois there, at page 81 of 127 N. E., went to considerable length to point out that the circuit court in such a case did not act within its general jurisdiction, but, instead, acted as *a court of special and limited jurisdiction* drawn from the statute conferring it.

Gill v. Lynch, supra, involved a proceeding for the appointment of a receiver, which was commenced in a county court. The County Courts in Illinois are courts of record,[1] but they are courts of special and limited jurisdiction[2] and possesses no general equity power.[3]

[1] Constitution of Illinois, Art. VI, § 18, Illinois Revised Statutes, 1941, Chap. 37, § 171.

[2] Illinois Revised Statutes, 1941, Chap. 37, §§ 175, 177; Montgomery v. Equitable Life Assur. Society, 7 Cir., 83 Fed. 2d 758, 761; People v. McWeeney, 295 Ill. 161, 162 N. E. 233, 237; People v. Harshbarger, 296 Ill. App. 397, 16 N. E. 2d 247.

[3] McDonough v. Gage, 357 Ill. 466, 192 N. E. 417, 419; People ex rel. First of Englewood Bond & Mortgage Corp., 357 Ill. 475, 192 N. E. 419, 420; Gill v. Lynch, supra.

It is, we submit, highly significant that in neither of the cases just above referred to was there involved an action commenced in a court of general jurisdiction, but in both of those cases the Supreme Court of Illinois held that the Illinois Venue Act applied, and authorized the transfer to a proper court (i. e., one having jurisdiction to hear and determine the action) of an action instituted in the wrong court (i. e., one having no jurisdiction to hear and determine the action).

In the second place, if the Illinois Venue Act were limited in its application to the circuit courts of that state—courts of general jurisdiction—so as to authorize transfer to a proper circuit court of any suit commenced in the wrong circuit court because outside its territorial jurisdiction, and if as the Supreme Court said in its opinion below:[6]

> "The distinction to be drawn is that if a case is improperly filed in a court having jurisdiction of the cause generally but without its territorial jurisdiction, it may be transferred to the proper circuit court. But, if the cause is filed in a court which could never lawfully acquire jurisdiction, the transfer to a court which would have had jurisdiction gives no validity to the proceedings in the first court."

then the Illinois Venue Act would not, as was ruled in *Central Illinois Public Service Co. v. Industrial Commission, supra*, "reach those cases begun in courts not having jurisdiction of the subject matter," and would not, as the opinions and decisions in *Central Illinois Public Service Co. v. Industrial Commission, supra*, and *Gill v. Lynch, supra*, demonstrate, apply to courts of special or limited jurisdiction.

In this connection, it is also notable that, in *Central Illinois Public Service Co. v. Industrial Commission*,

[6] 384 Ill. 1 c. 246, 51 N. E. 2d. 1 c. 282 R. 32 in Case No. 2.

supra, and *Gill v. Lynch*, *supra*, the courts in which the actions were commenced *could never lawfully acquire jurisdiction generally over such actions*—that is to say, jurisdiction to hear and determine those actions. Notwithstanding that, it was held in both of those cases that such actions were properly commenced in those courts and properly transferred to the courts having jurisdiction to hear and determine them.

In the third place, the distinction attempted by the Supreme Court of Illinois in the quotation just above made from the opinion of that Court in petitioner Herb's case, which is also urged upon this Court by respondents, manifestly confuses venue and jurisdiction—a confusion which respondents warn against at page 40 of their brief, but into which respondents themselves have fallen, along with the Supreme Court of Illinois.

We believe that our original brief herein demonstrates that any finding or decision by the Supreme Court of Illinois against these petitioners upon a non-federal ground is without any fair or substantial support in the law of Illinois established by the Illinois Venue Act (Illinois Revised Statutes, 1941, Chap. 146, § 36) and the construction of that Act in *Central Illinois Public Service Co. v. Industrial Commission*, 293 Ill. 62, 127 N. E. 80, and *Gill v. Lynch*, 367 Ill. 203, 10 N. E. 2d 812. Those two decisions, which are the only Illinois decisions other than those now under review construing and applying the Illinois Venue Act, clearly establish that petitioners' respective actions were "commenced" within two years after petitioners' causes of action accrued, and that the courts in which such actions were commenced possessed, by virtue of the Illinois Venue Act, the power and authority to transfer petitioners' actions to courts having the power to hear and determine such actions. Those two decisions were not overruled by the decisions here under review, but

were written around to such an extent that, in petitioner Herb's case, the Supreme Court of Illinois said:[7]

> "We think the interpretation of the venue statute in the Gill case conclusively is against appellant."

This, notwithstanding that the Gill case clearly ruled valid the commencement of an action in a court which was without jurisdiction to hear and determine it, as well as ruling valid the transfer of such action, by change of venue under the Illinois Venue Act, to a court having jurisdiction to hear and determine it; and ruled invalid only the proceedings between the commencement of the action and the transfer of it to the proper court.

Conclusion.

In conclusion, we submit that the decisions of the Supreme Court of Illinois in the cases here under review are based upon a decisive federal question, viz.: the interpretation and construction of Section 6 of the Federal Employers' Liability Act; that the interpretation and construction of that section of the Federal Act by the Illinois Supreme Court is erroneous in that it placed upon petitioners not only the requirement of commencing their actions within two years after their causes of action accrued, but an additional requirement—not made or authorized by that Act—of commencing their actions within such time in courts having jurisdiction to hear and determine the actions; that, if the decisions of the Supreme Court of Illinois were not based upon that federal question which was so erroneously determined, but were based upon non-federal questions regarding the time of commencement of actions in, and the jurisdiction of, the Illinois courts, then, the decisions below were plainly untenable, and without any fair or substantial support, because not decided according to the established law of Illinois, but by "writing

[7] 51 N. E. 2d, 1 c. 282 R. 32 in Case No. 24

around" the plain language of the Illinois statutes and decisions establishing the law upon such questions, so as to discriminate against the rights of petitioners arising under federal law, and so as to preclude review by this Court.

Accordingly, we respectfully submit that the judgments and decisions below should be reversed, and these causes remanded, in order that petitioners may have a trial of their respective actions upon the merits.

Respectfully submitted,

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Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

No. [redacted] 21

VICTOR J. HERB,
Petitioner,

vs.

NORMAN B. PITCAIRN and FRANK C. NICODEMUS, JR.,
Receivers for Wabash Railway Company, a Corporation,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

No. 681.

VICTOR J. HERB,
Petitioner,

vs.

NORMAN B. PITCAIRN and FRANK C. NICODEMUS, JR.,
Receivers for Wabash Railway Company, a Corporation,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The summary statement of petitioners refers to matters in no way involved in the proceeding now before this Court. The material facts are as follows:

On December 22, 1937, petitioner, as plaintiff, filed in the City Court of Granite City, Illinois, his complaint against respondents, as defendants (R. 7), under the Federal Employers' Liability Act (U. S. C., 1934 Ed., Tit. 45, Secs. 51-59), for personal injuries sustained by petitioner on the 23rd day of November, 1936, in or near the City of Decatur,

Illinois, and beyond the city limits of the City of Granite City, Illinois, alleging in said complaint a violation, by respondents, of the provisions of the Federal Safety Appliance Act (U. S. C., 1934 Ed., Tit. 45, Secs. 1-16) relating to hand brakes. A summons was issued by said City Court and served upon respondents (R. 12).

Thereafter, on the 16th day of March, 1942, the Supreme Court of Illinois filed opinions in two cases then pending in said court, namely, Werner v. Illinois Central Railroad Company, 379 Ill. 559, 42 N. E. (2d) 82, and Mitchell v. Louisville & N. R. Co., 379 Ill. 522, 42 N. E. (2d) 86, in each of which cases said Supreme Court held that the various City Courts, in Illinois, were without jurisdiction to hear and determine the subject matter of any action, the cause of which arose outside of and beyond the territorial limits of the City Court in which such action was pending. After learning of these decisions, petitioner, on June 17, 1942, filed a motion in the City Court of Granite City for a change of venue to the Circuit Court of Madison County, Illinois, under the provisions of an Illinois statute known as the **Venue** Act (Ill. Rev. Stat. 1941, Chap. 146, Par. 36), purporting to authorize a change of venue of a suit commenced in the wrong court or county, to a proper court or county. In this motion, which appears at page 24 of the transcript of record, petitioner stated: "This suit or action has been commenced, and is pending, in the **wrong court**, and the venue thereof should be changed to a proper court pursuant to the terms and provisions of Chap. 146, Par. 36, Illinois Revised Statutes 1941." (Emphasis supplied.) No other relief was prayed for in said motion, and authority to change the venue of this case from said City Court to said Circuit Court was based solely upon said last-named statute.

For the convenience of the Court, we quote the material part of said statute:

"That wherever any suit or proceeding shall hereafter be commenced, in any court of record in this State, and it shall appear to the court where the same is pending, that the same has been commenced in the wrong court or county, then, upon motion of either or any of the parties to such suit or proceeding, the court shall change the venue of such suit or proceeding to the proper court or county, and the same, when the venue shall be so changed, shall be then pending and triable in such court or county to which the same shall be so changed the same as in other cases of change of venue."

On July 17, 1942, petitioner's motion for change of venue was allowed by said City Court and the venue ordered changed to the Circuit Court of Madison County, Illinois (R. 5), and on July 31, 1942, more than five (5) years after petitioner was injured, and more than four (4) years after filing his complaint in said City Court, all of the pleadings and papers and a certified transcript of all orders in said cause, in the City Court of Grante City, were duly filed in the Circuit Court of Madison County as on change of venue (R. 1).

On August 21, 1942, respondents filed in said Circuit Court their motion to dismiss petitioner's alleged cause of action (R. 26). This motion was based principally upon two grounds, namely: (1) That all orders entered, and all pleadings had, in the City Court of Granite City, **including the order changing the venue thereof**, were void and of no effect, and that the statute (Ill. Rev. Stat. 1941, Chap. 146, Par. 36) authorizing a City Court to change the venue of an action, of which it has no jurisdiction, to a court having jurisdiction, is contrary to Section 1 of Article VI of the Constitution and is, therefore, void; and (2) that plaintiff did not "commence" his suit in a court, having jurisdiction of the subject matter or any court of competent jurisdiction, within two (2) years from the date

he sustained his injuries, as required by Section 6 of the Federal Employers' Liability Act (Sec. 56, Tit. 45, U. S. C. A.).

On November 27, 1942, the Circuit Court of Madison County sustained respondents' motion to dismiss, and dismissed said suit, and entered judgment against petitioner in bar of the action (R. 30-31). From that order and judgment petitioner (plaintiff) duly appealed to the Supreme Court of the State of Illinois (R. 32-33), where the judgment of the Circuit Court of Madison County, Illinois, was on September 24, 1943, affirmed (R. 35-44).

The opinion and decision of the Supreme Court of Illinois was based principally upon petitioner's (plaintiff's) failure to "commence" his suit in a court of competent jurisdiction, within two (2) years after sustaining his injuries, as required by Section 6 of the Federal Employers' Liability Act. This is apparent from the following statement of the Court in its said opinion, namely:

> "The material point for consideration is whether the plaintiff has commenced an action within two years of the date of his injury in a court having jurisdiction to hear and determine the same, as required by Section 6 of the Federal Employers' Liability Act, by transferring the cause from a court having no jurisdiction over it at a date which, if then originally filed in the latter court, could not be maintained because not filed within the statutory time" (R. 37). • • •
>
> "It is clear a suit was not commenced by filing the present suit in the City Court of Granite City, or by issuing summons or filing a complaint. Lacking requisite jurisdiction **because of the provisions of the Constitution limiting it to cases arising within the limits of the city**, such Court was wholly incompetent to render any judgment or to authorize any proceedings which would result in a judgment. When the case was transferred to the Circuit Court of Madison County, some five years after the date of the accident,

by the filing of the transcript of orders entered in the City Court, and the pleadings and other documents, there was no commencement of a suit, but only the receipt of papers from a court in which it was impossible to commence one because of its lack of jurisdiction." (Emphasis supplied.)

QUESTION PRESENTED.

The only question presented on this record is, whether or not the Circuit Court of Madison County, Illinois, by reason of the order of the City Court of Granite City, Illinois, changing the venue of this cause to the Circuit Court, and by filing in said Circuit Court a transcript of the record of said City Court in said cause, acquired jurisdiction to hear and determine the same.

REASONS AGAINST ALLOWANCE OF THE WRIT AND AUTHORITIES IN SUPPORT THEREOF.

I.

The record in this case presents no federal question, and this Court is without jurisdiction to review the decision and judgment of the Supreme Court of Illinois.

(a) Whether or not a state court has jurisdiction of an alleged cause of action, although begun under the Federal Employers' Liability Act, does not present a federal question.

St. Louis, I. M. & S. Ry. Co. v. Taylor, 210 U. S. 281, 285, 52 Law Ed. 1061, 1064;
Mondou v. N. Y. N. H. & H. R. Co., 223 U. S. 1, 58, 56 L. Ed. 327, 349;
Chambers v. B. & O. R. Co., 207 U. S. 142, 148-149, 52 L. Ed. 143, 146;
John v. Paullin, 231 U. S. 583, 58 L. Ed. 381, 383;
Manning v. Ketcham, 58 Fed. (2d) 948, 949.

(b) State courts derive their jurisdiction from the Constitution and laws of the states. The Federal Employers' Liability Act does not attempt to enlarge or regulate the jurisdiction of state courts, but only gives an injured person the right to file suit, under that act, in a state court, where such a court, **under the local law, has jurisdiction** to hear cases of that character, as Congress cannot confer jurisdiction upon any court which it has not created.

St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 285, 52 L. Ed. 1061, 1064;
Chambers v. B. & O. R. Co., 207 U. S. 142, 148-149, 52 L. Ed. 143, 146;
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Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211, 222, 60 L. Ed. 961, 965;

Walton v. Pryor, 276 Ill. 563, 566-567, 115 N. E. 2;
Mo. River Tel. Co. v. First Nat'l Bank, 74 Ill. 217;
Dougherty v. American McKenna Co., 255 Ill. 369, 99 N. E. 619;
Taylor v. Southern Ry. Co., 350 Ill. 139, 182 N. E. 805.

(c) The state laws and practice relative to the jurisdiction of State courts, the mode, time and manner of invoking that jurisdiction and the rules of practice, to be applied in its exercise, are no less applicable when federal rights are in controversy, than when the case turns entirely upon questions of local or general law.

John v. Paullin, 231 U. S. 583, 58 L. Ed. 381, 383;
Goldenburg v. Murphy, 108 U. S. 162, 27 L. Ed. 686;
Chesapeake & O. R. Co. v. De Atley, 241 U. S. 310, 60 L. Ed. 1016.

(d) The proper construction, interpretation and effect of a State statute, being a question of local law and not federal law, the decision of a State court thereon is not subject to review by the federal Supreme Court on writ of error to the State court.

Knights of Pythias v. Meyer, 265 U. S. 30, 68 L. Ed. 885, 888;
Hotel & R. E. Int. v. Wisconsin E. R. Bd., 315 U. S. 437, 86 L. Ed. 946;
Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 680, 74 L. Ed. 1107, 1113;
Morehead v. People ex rel. Tipaldo, 298 U. S. 587, 609, 80 L. Ed. 1347, 1354, 103 A. L. R. 1445, 1451;
Senn v. Tile Layers' Union, 301 U. S. 468, 477, 81 L. Ed. 1229, 1235;
Moore v. I. C. R. R. Co., 312 U. S. 630, 634, 85 L. Ed. 1089, 1092.

(e) U. S. Supreme Court, on writ of error, must accept, as final, the ruling of the State court of last resort on all matters of State law.

Fox River Paper Co. v. R. R. Com., 274 U. S. 651, 655, 71 L. Ed. 1279, 1283, 1284;
Saner v. N. Y., 206 U. S. 536, 51 L. Ed. 1176;
Kaukauna W. Power Co. v. Green Bay & M. Canal Co., 142 U. S. 254, 272, 277, 35 L. Ed. 1004, 1010, 1012;
Brinkerhoff-Faris Trust & Sav. Co., 281 U. S. 673, 680, 74 L. Ed. 1107, 1113.

(f) Whether a State court has jurisdiction of a case or not is a question exclusively for the State court and its decision is not reviewable in the U. S. Supreme Court on certiorari.

Smith v. Adsit et al., 16 Wall. 185, 21 L. Ed. 310, 311.

(g) The decision of the Supreme Court of Illinois rests upon a nonfederal ground which independently and adequately supports the State court judgment. In such case this Court will not take jurisdiction.

Kalb v. Feurstein, 308 U. S. 433, 84 L. Ed. 370, 373;
Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U. S. 157, at 164;
Chicago, B. & Q. Ry. v. Illinois ex rel. etc., 200 U. S. 561, 580;
West Chicago etc. R. Co. v. Illinois ex rel. etc., 201 U. S. 506, 519;
Murdock v. Memphis, 20 Wall. 590, 634;
Klinger v. Missouri, 13 Wall. 257, 263;
Lynch v. New York ex rel., 293 U. S. 52, 54;
Honeyman v. Hanan, 300 U. S. 14, 81 L. Ed. 476.

II.

Petitioner's alleged cause of action was not "commenced" in a court of competent jurisdiction within two years after said alleged cause of action accrued, as required by Section 6 of the Federal Employers' Liability Act.

(a) The City Court of Granite City was without jurisdiction to hear and determine petitioner's alleged cause of action, as it arose in or near Decatur, Illinois, and without the territorial limits of the City of Granite City. This is admitted by petitioner, both in his petition filed herein and by his motion for change of venue to the Circuit Court of Madison County, Illinois (R. 24).

Constitution of 1870, Article VI, Sec. 1;
People ex rel. Beebe v. Evans, 18 Ill. 361;
Covill v. Phy, 26 Ill. 432;
Joslyn v. Dickerson, 71 Ill. 25;
Hercules Iron Works v. Elgin, Joliet and Eastern Ry. Co., 141 Ill. 491, 30 N. E. 1050;
Miller v. People, 230 Ill. 65, 82 N. E. 521;
People ex rel. Sokoll v. Municipal Court, 359 Ill. 102, 194 N. E. 242;
Ladies of Maccabees v. Harrington, 227 Ill. 511, 81 N. E. 533;
Werner v. Ill. Cent. Ry. Co., 379 Ill. 559, 42 N. E. (2d) 82;
Mitchell v. L. & N. R. R. Co., 379 Ill. 522, 42 N. E. (2d) 86;
Smith v. L. & N. R. R. Co., 381 Ill. 55, 44 N. E. 841;
Herb v. Pitcairn, 384 Ill. 237, 51 N. E. (2d) 277.

(b) The Illinois Venue Act (Par. 36, Chap. 146, Ill. Rev. Stat. 1941), in so far as it authorized a change of venue in this case from the City Court of Granite City to the Circuit Court of Madison County, is in violation of Section 1, Article VI of the Constitution of 1870 of the State of Illinois and is therefore void; and the order of the City Court of

Granite City of July 17, 1942 (R. 5-6), changing the venue of this case to the Circuit Court, is null and void.

Authorities cited under II (a), supra.

(c) Petitioner's right to recover under the Federal Employers' Liability Act is conditioned: (1) Upon his "commencing" his action within two years from the date of his injury (that being the limitation period at said time); and (2) upon "commencing" such suit in a court having **jurisdiction to hear and determine the same.**

Sec. 6, Federal Employers' Liability Act (Sec. 56, Title 45, U. S. C. A. 1941);
Central Vermont Ry. Co. v. White, 238 U. S. 507, 59 L. Ed. 1433;
Atlantic Coast Line R. Co. v. Burnette, 239 U. S. 199, 60 L. Ed. 226;
Mo. K. & T. R. Co. v. Harriman Bros., 227 U. S. 657, 57 L. Ed. 690;
Bell v. Wabash Ry. Co., 58 Fed. (2d) 569, 571;
American R. Co. of Porto Rico v. Coranas, 230 Fed. 545, 546;
Fairclough v. Southern Pacific Co. (N. Y. App. Div. Sup. Ct.), 157 N. Y. S. 862;
Gulf, C. & F. S. Ry. Co. v. Gordon (Civil Appls. Court of Tex.), 218 S. W. 74;
Sweet v. Chattanooga Elec. Light Co. (Tenn.), 36 S W. 1090;
Walton v. Pryor et al., 276 Ill. 563, 568-569;
Cotton v. Wabash R. Co. (Iowa), 199 N. W. 1005;
Kavanaugh v. Folsom, 181 Fed. 401;
Herb v. Pitcairn, 384 Ill. 237.

(d) Petitioner, having predicated his case upon the Federal Employers' Liability Act, and having filed same in a court having no jurisdiction of the subject matter, has never "commenced" his suit, within the meaning of section 6 of said act.

Walton v. Pryor, 276 Ill. 563, 568-569, 115 N. E. 2;
Trapp v. B. & O. R. R. Co., 283 Fed. 655, 656;

Sweet v. Chattanooga Elec. Light Co. (Tenn.), 36 S. W. 1090;
Fairclough v. Southern Pacific Co. (N. Y. App. Div. Sup. Ct.), 157 N. Y. S. 862;
Gulf, C. & S. F. Ry. Co. v. Gordon (Civil Appls. Court of Tex.), 218 S. W. 74;
Inter-Southern Life Ins. Co. v. Pierce, 31 S. W. (2d) 692;
Willing v. Provident Trust Co., 21 Fed. Supp. 237, 238;
Manning v. Ketchem, 58 Fed. (2d) 948, 949;
State ex rel. Egan v. Wolever, 127 Ind. 306, 26 N. E. 762, 763;
Schroeder v. Merchants & Mechanics Ins. Co., 104 Ill. 71;
Vincent v. McElvain, 304 Ill. 160, 163, 136 N. E. 502;
C. J. S., Vol. 1, p. 1392;
C. J. S., Vol. 21, pp. 177-178;
C. J., Vol. 67, p. 147;
Fidelity Trust Co. v. Gill Car Co., 25 Fed. 737;
Crowley v. Southern Ry. Co., 139 Fed. 851;
Denny v. Southern Pac., 263 Ill. App. 106.

III.

Removal of an action from a state court, which has no jurisdiction, to a federal court, confers no jurisdiction on the federal court, although it might in a like suit, originally brought there, have had jurisdiction.

Lambert Co. v. B. & O. R. Co., 258 U. S. 377, 382, 66 L. Ed. 671, 675;
Venner v. Michigan Central R. Co., 271 U. S. 127, 70 L. Ed. 868;
Bull v. Chicago M. & St. P. Ry. Co., 6 Fed. (2d) 329, 332;
Compton v. Carter Oil Co., 283 Fed. 22.

ARGUMENT.

I.

The record in this case presents no federal question and this Court is without jurisdiction to review the decision and judgment of the Supreme Court of Illinois.

Petitioner, admittedly, filed his suit in the wrong court, namely, the City Court of Granite City, Illinois, which had no jurisdiction. More than four (4) years after filing his suit in said court that Court, on petitioner's motion, pursuant to the Illinois Venue Act, hereinbefore referred to, changed the venue and transferred said cause to the Circuit Court of Madison County, Illinois, which latter court held that it did not acquire jurisdiction to hear the same, and said suit, on respondents' motion, was dismissed and a judgment, in bar of the action, was entered by said Circuit Court. This order and judgment was affirmed by the Supreme Court of Illinois, the highest court of that state. Whether or not the City Court of Granite City, a state court, had jurisdiction to try this case and if not to remove it to the Circuit Court pursuant to the Illinois Venue Act (Ill. Rev. Stat. 1941, Chap. 146, Sec. 36), are purely questions of local law and not federal questions. The jurisdiction of state courts is regulated entirely by the Constitution and laws of the several states and is not a matter of federal control. This is elementary and has repeatedly been so declared by this Court.

In St. Louis & Iron Mountain Railroad Company v. Taylor, 210 U. S. 281, 52 L. Ed. 1061, plaintiff, as administratrix of the estate of George W. Taylor, brought suit in Arkansas under the Federal Employers' Liability Act against the railroad company to recover damages for the benefit of Taylor's widow and next of kin on account of his injury and consequent death, alleged to have been

caused by the company's negligence. The accident and death happened in the Indian Territory and the plaintiff obtained a judgment which was affirmed by the Supreme Court of Arkansas. The United States Supreme Court decided that the question of jurisdiction of the state court was not a federal question and that this Court had no jurisdiction to review the decision of the state court, holding that it had jurisdiction. In the opinion in that case this Court, on page 285 (52 L. Ed. 1064), said:

> "The plaintiff in error contends that of such a cause, triable as it was in the courts of the territory created by Congress, the courts of Arkansas have no jurisdiction. **This contention does not present a federal question.** Each state may, subject to the restrictions of the Federal Constitution, determine the limits of the jurisdiction of its courts, the character of the controversies which shall be heard in them, and, specifically, how far it will, having jurisdiction of the parties, entertain in its courts transitory actions where the cause of action has arisen outside its borders. Chambers v. Baltimore & O. R. Co., 207 U. S. 142, ante, 143, 28 Sup. Ct. Rep. 34. We have, therefore, no authority to review the decision of the state court, so far as it holds that there was jurisdiction to hear and determine this case. **On that question the decision of that court is final.**" (Emphasis ours.)

In Chambers v. Baltimore & Ohio Railroad, 207 U. S. 142, 147, 52 L. Ed. 143, 146, this Court said:

> "But, subject to the restrictions of the Federal Constitution, the state may determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them."

In John v. Paullin, 231 U. S. 583, 58 L. Ed. 381, at page 383, this Court said:

> "Without any doubt, it rests with each state to prescribe the jurisdiction of its appellate courts, the

mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when federal rights are in controversy than when the case turns entirely upon questions of local or general law."

It cannot be said that the Illinois courts, by refusing to assume jurisdiction in the instant case, denied petitioner, as far as jurisdiction is concerned, any right or privilege to prosecute his suit in a state court pursuant to Section 6 of the Federal Employers' Liability Act (U. S. C. A., Tit. 45, Sec. 56), which provides that the jurisdiction of the courts of the United States under said chapter shall be concurrent with that of the courts of the several states. This act does not confer any jurisdiction upon state courts or in any way enlarge their jurisdiction, as Congress is without authority to confer jurisdiction upon a state court, or any other court, which it has not ordained or established. This Court had occasion to construe this section of the act in question in the Employers' Liability cases, 223 U. S. 1, 56 L. Ed. 327, and said on page 349 (56 L. Ed.):

"There is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts, or to control or affect their modes of procedure, but only a question of the duty of such a court, **when its ordinary jurisdiction, as prescribed by local laws**, is appropriate to the occasion and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress, and susceptible of adjudication according to the prevailing rules of procedure. * * * It is true, the sovereignties (referring to the Federal Government and the several states) are distinct, and **neither can interfere with the proper jurisdiction of the other**, as was so clearly shown by the Chief Justice Taney in the case of Ableman v. Booth,

21 How. 506, 16 L. Ed. 169; and hence the state courts have no power to revise the action of the federal courts, nor the federal the state, except where the Federal Constitution or laws are involved." (Emphasis supplied.)

In Walton v. Pryor, 276 Ill. 563, the Supreme Court of Illinois in construing this section of the federal act held that whether a Circuit Court in Illinois had jurisdiction of an action for damages under the Federal Employers' Liability Act must be determined by the laws and Constitution of Illinois, as Congress cannot confer jurisdiction upon any court which it has not created, and that there was no restriction in the Federal Constitution upon the power of a state to determine the limits of the jurisdiction of its courts, except that the state must give to citizens of other states the same rights that it accords to its own citizens. In that case the Court, on page 569 of the opinion, said:

"In view of the powers of the Federal Government and the states and in the light of the uniform decisions relating to the subject, this provision can only mean that when the jurisdiction of the courts of a state, **as fixed by local laws**, empowers them to hear and determine a certain class of actions, an action of that class arising under federal law may be enforced as of right in the state court."

This doctrine has been consistently followed both by this Court and state courts. Among the numerous decisions upholding this rule, we call the Court's attention to Minneapolis & St. Louis R. R. Co. v. Bombolis, 241 U. S. 211, 222, 60 L. Ed. 961, 965, and Taylor v. Southern Ry. Co., 350 Ill. 139, ... N. E. ...

Petitioner bases his right to change the venue in this case to the Circuit Court solely upon a state statute, and insists that, by virtue of this statute, the City Court had a

limited jurisdiction to transfer the cause to a proper court. His position in this respect is repeatedly stated throughout his petition and brief. The Supreme Court of Illinois did not so hold, but commenting thereon, said (R. 39):

> "Apparently it is his contention that, having begun the suit in a court without jurisdiction of the subject matter, but having changed the venue thereof and transferred it to one that would have jurisdiction, the date of the transfer to the latter court would relate back to the time of filing it in the court not having jurisdiction, thus giving the order changing the venue the effect of having a case continuously pending in the court of proper jurisdiction from the time the action was commenced in the one not having it. The fallacy of this argument rests in the fact that it becomes necessary to give validity to proceedings in the court, the judgment of which, if rendered upon such proceedings, would be wholly void."

The Court further said (R. 40):

> "If appellant's contention is sustained a valid judgment could be obtained by transferring the cause to the proper court upon a summons or notice that defendants could safely disregard when served upon them. This would give the order of transfer by the City Court the effect of vitalizing process that was void and considering a case commenced and pending in the proper court during a period when, in legal contemplation, no judicial control of defendants had yet been exercised."

The Court further said (R. 42):

> "When the case was transferred to the Circuit Court of Madison County, some five (5) years after the date of the accident, by the filing of the transcript of orders entered in the City Court, and the pleadings and other documents, there was no 'commencement' of a suit, but only the receipt of papers from a court in which it was impossible to commence one because of its lack of

jurisdiction. To hold the suit was started in the Circuit Court at the time when it was attempted to be commenced in the City Court is not only to decide something which is obviously not the fact, but also to give effect to the proceedings in another court, which up to that time must be considered as a nullity."

The Supreme Court of Illinois definitely held that the City Court had no jurisdiction to enter any order, and that the so-called Venue Act was not sufficient to bridge the chasm between the City and Circuit Courts. The proper construction, interpretation and effect of a state statute, **being a question of local law,** the decision of a state court thereon is not subject to review by the Federal Supreme Court on writ of error to the state court. See authorities, point I (d).

In Knights of Pythias v. Meyer, 265 U. S. 30, 68 L. Ed. 885, 888, this Court said:

> "Under the settled rule of this court, declared so frequently and uniformly as to have become axiomatic, we must accept this decision of the highest court of the state, fixing the meaning of the state legislation as though such meaning had been specifically expressed therein."

Petitioner's position, that the City Court had limited jurisdiction to transfer this case to the Circuit Court, is based entirely upon his contention as to the holding of the Supreme Court of Illinois in Central Illinois Public Service Company v. Industrial Commission, 293 Ill. 62, 127 N. E. 80, which he says was followed in Gill v. Lynch, 367 Ill. 203, 10 N. E. (2d) 812. The Illinois Court did not so hold in either case. In the Central Illinois Public Service Company case the constitutionality of the Venue Act was not raised, nor was any section or provision of the State Constitution referred to or construed. In that case, a certiorari proceeding commenced in the Circuit Court of

Coles County was, pursuant to the Venue Act, transferred by said Circuit Court to the Circuit Court of Champaign County because defendant resided in that county and service could not be had upon him in Coles County. The Circuit Court, in making this transfer, only went so far as to determine what was the intention of the Legislature in enacting this statute. Whether the act was in violation of the Constitution or whether the Legislature had the power to pass the act was not raised or decided in that case. The Venue Act, in so far as it applies to **Circuit Courts**, is valid because there is no provision of the State Constitution which prohibits the Legislature from conferring this power upon such courts. Circuit Courts are authorized by the Constitution, with general powers, among which would be the power, constitutionality granted by the Legislature, to transfer the cause to another court. Section 12, Article VI of the Constitution of Illinois, 1870, provides:

> "The Circuit Court shall have original jurisdiction of all causes in law and equity."

There is no such constitutional provision pertaining to city courts. On the contrary, Section 1 of Article VI of the State Constitution expressly restricts and limits the inherent power of the Legislature, with reference to city courts, and the Supreme Court of Illinois has construed that provision of the Constitution to mean that the Legislature can bestow no power on city courts except such power as is authorized by that provision of the Constitution. See authorities respondents' brief II (a) and (b). However, the Supreme Court of Illinois, in its opinion in the instant case, refers to the Central Illinois Public Service Company case and the Gill case and says that its interpretation of the Venue Act in those cases is **against petitioner's contention** (R. 42).

Petitioner, on page 11 of his brief, says, "The question

of when a suit is commenced in a state court is a matter which the federal courts recognize as being controlled generally by the practice in the particular state," and in support of this cites a number of Federal Supreme Court decisions, and on page 19 of his brief he further states, "The practice and procedure in actions brought under the Federal Employers' Liability Act in a state court will be governed by the law of the state in which such court is located," citing authorities in support thereof. In view of these admissions by petitioner, there is nothing for this Court to review and the writ should be denied.

In Goldenburg v. Murphy, 108 U. S. 162, 27 L. Ed. 686, and other cases cited by petitioner, this Court has definitely held that the time and manner of "commencing" a suit, although brought under a federal statute, must be determined by the state law. In Chesapeake & O. R. Co. v. De Atley, 241 U. S. 310, 317, 60 L. Ed. 1016, 1021, cited by petitioner, this Court said:

> "Although the present action was based upon a Federal statute, it was triable and tried in the state court; hence, local rules of practice and procedure were applicable. Central Vermont R. Co. v. White, 238 U. S. 507, 511, 59 L. Ed. 1433, 1436 * * *; Minneapolis & St. L. R. Co. v. Bombolis, No. 478, this day decided (241 U. S. 211, ante)."

The Supreme Court of Illinois has decided that this case was not "commenced" in the state court within two (2) years, as required by the federal act. This is a question of local law for the state court and is not reviewable by the Federal Supreme Court. Not only does it appear that the decision of the Illinois Supreme Court rests upon a nonfederal question, but the transcript of record does not show what errors were assigned in that court on the appeal, or that any federal question was raised. Petitioner's motion for a change of venue filed in the City Court (R. 24), his petition for a rehearing, filed in the

State Supreme Court (R. 47), and his petition filed in this court, show that petitioner relies upon the Illinois Venue Act to transfer his case to the Circuit Court and to confer jurisdiction thereon. He raises no other question. This merely involves the construction and application by a state court of a state statute which is not a federal question and not subject to review by this Court. For this reason alone, certiorari in this case should be denied.

II.

Petitioner's alleged cause of action was not "commenced" in a court of competent jurisdiction within two years after same accrued, as required by Section 6 of the Federal Employers' Liability Act.

In the instant case the Supreme Court of Illinois in its opinion (R. 38) said: "Recovery under the Federal Employers' Liability Act is conditioned upon two things: (1) commencing an action within two (2) years from the date of the injury; and (2) commencing such action in a court having jurisdiction to hear and determine the same." The same Court had occasion to construe this Act in Walton v. Pryor et al., 276 Ill. 563, 568-569, heretofore referred to, as well as in later cases, and definitely held that the Federal Act gave an injured person no right to file suit under said act in a state court, **unless that court had jurisdiction to hear and determine such suit.**

In Trapp v. B. & O. R. Co., 283 Fed. 655, the District Court for the Northern District of Ohio, in construing the provision of the Federal Act, with reference to the courts in which suits under said act might be brought, said (page 656):

> "By this amendment, the action arising under that act may be brought in any one of four places: (1) in the district of the residence of the defendant; (2) in the district in which the cause of action arose; (3) in

the district in which the defendant shall be doing business * * *; (4) **in any state court which by the laws of the state has cognizance of the cause of action and may acquire jurisdiction of the parties.**" (Emphasis supplied.)

In Mondou v. New York, N. H. & H. R. Co., 223 U. S. 1, 56-57, 56 L. Ed. 327, this Court said (page 349):

> "We deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of State Courts, or to control or affect their modes of procedure, but only a question of the duty of such a court, **when its ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion**, and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress, and susceptible of adjudication according to the prevailing rules of procedure." (Emphasis supplied.)

Petitioner's contention (page 22 of his brief), that Section 6 of the Liability Act does not require that actions, thereunder, be brought within the two (2) years **in a court having jurisdiction to hear and determine the same** is well answered by what the Supreme Court of Illinois said in the instant case (R. 37), as follows:

> "If the court has no jurisdiction of the subject matter for judgment, there can be no jurisdiction giving effect to process or pleadings. If judgment had been entered in the City Court, it would have been absolutely void. (Werner v. Illinois Central Railroad Co., 379 Ill. 559; Mitchell v. Louisville & Nashville Railroad Co., 379 Ill. 522.) The act of a tribunal beyond its jurisdiction is null and void whether without its territorial jurisdiction or beyond its powers. (Welton v. Hamilton, 344 Ill. 82.) A judgment void upon its face and requiring only an inspection of the record to demonstrate its invalidity is a mere nullity, in legal effect, no judgment at all, conferring no right and affording no justification."

The Illinois Supreme Court has uniformly held, for a period of more than 85 years, beginning with the case of People v. Evans, 18 Ill. 361, decided in 1857, that city courts in Illinois created under Section 1, Article VI of the Constitution of Illinois (and under the corresponding section of the Constitution of 1848), have no jurisdiction beyond the city limits. These authorities are reviewed in the **Werner** case, supra, and it is not necessary to discuss them further except to say that in all of them the Court held that the territorial jurisdiction of city courts of Illinois was **limited by the Constitution** and that the Legislature did not have the constitutional authority to extend the jurisdiction of such courts beyond the corporate limits. For the reasons given in the Werner case, and the numerous cases therein mentioned, the so-called Illinois Venue Act, in so far as it authorized the City of Court of Granite City to transfer this cause to the Circuit Court, was in violation of the State Constitution and therefore void. Accordingly, the order of the City Court, admittedly a court without jurisdiction, transferring or changing the venue of this cause to the Circuit Court was a nullity.

Petitioner further contends (Petitioner's Brief, pp. 18-19) that, having begun this suit in a court without jurisdiction, but having changed the venue thereof to one that had jurisdiction, the date of the transfer to the latter court would relate back to the time of filing it in the court not having jurisdiction, thus giving the order changing the venue the effect of having a case continuously pending in the court of proper jurisdiction from the time the action was commenced in the one not having it. Justice Gunn of the Illinois Supreme Court, in the opinion in the instant case (R. 39), answers this contention as follows:

> "The fallacy of this argument rests in the fact that it becomes necessary to give validity to proceedings in the court, the judgment of which, if rendered upon such proceedings, would be wholly void. * * * It

is difficult to understand how any of the preliminaries to such a judgment, such as summons, pleadings, interlocutory orders and the like, have any effect when the result, had such proceeding been concluded in the first court, would have been a nullity."

A case in point is illustrated by the facts in Crowley v. Southern Ry. Co., 139 Fed. 851. The Alabama Legislature had attempted to create a Circuit Court with different divisions, but the act creating it was held unconstitutional in Ex rel. Birmingham & Atlanta Ry. Co., 42 So. 118. In the Crowley case the cause of action was claimed to be saved because a summons had been issued out of such illegal division of the Circuit Court, but in commenting upon the effect of this summons the Court said:

"The act constituting the southern division of the Circuit Court of St. Clair County at Pell City being unconstitutional, there was no authority for filing the summons and complaint with Smith or anybody else. * * * The issue of the summons to appear before a court or at a time not authorized by law was a nullity, and so was the service of the summons. What was done in this matter at Pell City was as ineffectual to institute a 'suit' in the real Circuit Court of St. Clair County as if the plaintiff had filed the summons and complaint with some merchant at Pell City."

In Vol. 21, C. J. S., pp. 177-178, it is said:

"Where a court is without jurisdiction in the particular case, its acts and proceedings can be of no force or validity and are a mere nullity and void."

In the case of Inter-Southern Life Ins. Co. v. Pierce, 31 S. W. (2d) 692, it is said:

"Without jurisdiction the Chancery Court of Washington County * * * could make no valid order or decree in the case impairing the substantive rights of defendant. It had no power **to transfer** the case to Greene County."

In Willing v. Provident Trust Co., 21 Fed. Sup. 237, at page 238, the Court said:

> "In the second place, since it appears, as we have seen, that this court is without jurisdiction to entertain the cause of action involved in the original scire facias, it follows that the court has no power to allow an amendment conferring jurisdiction, **since that in itself would be an exercise of jurisdiction.** Holton v. Holton, 64 Or. 290, 129 P. 332, 48 L.R.A. (N.S.) 779." (Emphasis supplied.)

In Manning v. Ketchem, 58 Fed. (2d) 948, at page 949, the Court used this language:

> "When a judge acts in the clear absence of jurisdiction, i. e., of authority to act officially over the subject matter in hand, the proceeding is coram non judice. In such a case the judge has lost his judicial function. * * * In State ex rel. Egan v. Wolever, 127 Ind. 306, 26 N. E. 762, 763, the court said: 'The converse statement of it is also ancient. Where there is no jurisdiction at all there is no judge; the proceeding is as nothing.'"

Section 6 of the Federal Act in question is not a statute of limitations pertaining to the remedy, but is a condition of liability constituting a substantial part of the right created (Central Vermont Ry. Co. v. White, 238 U. S. 507, 59 L. Ed. 1433; Phillips v. Grand Trunk Ry. Co., 236 U. S. 662, 59 L. Ed. 774; Atlantic Coast Line Ry. Co. v. Burnette, 239 U. S. 199, 60 L. Ed. 226; Bell v. Wabash Ry. Co., 58 Fed. [2d] 569). In Bell v. Wabash Ry. Co., supra, plaintiff relied upon a statute of the State of Missouri, which, in effect, extended the time, as fixed by the Federal Act, in which to file suit. In disposing of this question the Circuit Court of Appeals for the Eighth Circuit said (page 572):

> "It is suggested in the brief of counsel for appellee that there is a Missouri statute providing that if

> plaintiff commenced suit within the time fixed by law, and afterwards suffers a nonsuit, he may commence a new suit within one year from the date he suffers such nonsuit, but surely it would not be contended that a state statute could extend the period of limitation fixed by the Federal Employers' Liability Act, and this is the act upon which appellant's suit is based. **A state statute cannot recreate a right given under a federal statute that has ceased to exist by the very terms of the statute. The liability itself is destroyed.**" (Emphasis supplied.)

The last sentence from the above quotation is a very significant statement and decides the question raised by petitioner's motion to change the venue of this cause to the Circuit Court. A person injured, while engaged in interstate commerce, cannot file a suit in a City Court in Illinois, having no jurisdiction, allow it to remain there five or six years or until the time he is required to file his suit under the Federal Act has expired, and then have it transferred by said City Court to some court having jurisdiction to try the case.

Illinois has a statute similar to the Missouri statute passed upon in the Bell case, namely, Section 24, Chapter 83, Ill. Rev. Stat. 1941, which provides, in part, as follows:

> "In any of the actions specified in any of the sections of this Act * * * if the plaintiff be nonsuited, then if the time limit for bringing such action shall have expired during the pendency of such suit the said plaintiff * * * may commence a new action within one year after such judgment is reversed or given against the plaintiff, and not after."

The Appellate Court of Illinois, Fourth District, passed upon the validity of this statute in Denny & Co. v. Southern Pacific Co., 263 Ill. App. 106, which involved a claim by plaintiff for damages, sustained by it, to certain goods de-

livered to defendant for transportation in interstate commerce. The shipment moved under a bill of lading which provided that suit must be instituted not later than two years and one day from the date the claims are declined. Suit was commenced within this period, but when the case was called for trial on December 5, 1929, plaintiff did not appear and the suit was dismissed for want of prosecution. In the meantime the period of limitations fixed by the bill of lading had expired. Plaintiff then sought to avail itself of the rights **given by the Illinois Limitation Act above quoted.** This section gave the right to the plaintiff to commence a new suit within one year after the judgment of nonsuit against him. Plaintiff, pursuant to this statute, commenced a new suit on December 4, 1930, which was within one year from the day its suit was dismissed, but after the expiration of the two years and one day limitation in the bill of lading. The trial court sustained defendant's motion to strike the plaintiff's statement of claim and dismiss the suit. The question presented was whether the limitation period contained in the bill of lading was the final and only period within which plaintiff could bring suit, or whether plaintiff, having brought suit within this period, which was subsequently dismissed, is entitled, after the bill of lading period of limitations expired, to avail itself of the additional one year within which to bring suit under the Illinois Limitations Act above referred to (Section 24, Chapter 83, Ill. Rev. Stat. 1941). The Appellate Court, in sustaining the action of the trial court, said:

> "We are of the opinion that Congress has assumed exclusive control of the subject of shipments under interstate commerce, and that the conditions named in the bill of lading are binding and exclusive of any State regulations. The very purpose of the federal legislation is to make the provisions regulating interstate commerce uniform without regard to local legislation upon the subject. To permit a shipper to bring suit

> under Section 2 of the Illinois Limitations Act, Cahill's St., Ch. 83, Par. 26, after the period in the bill of lading had expired, would violate this rule of uniformity. The federal law makes no provision for the commencing of a new suit after the period of limitations contained in the bill of lading has expired."

Petitioner has never "commenced" his alleged action within the meaning of the federal statute. An action instituted in a court having no jurisdiction to entertain it is no action in the sense of the statute.

In Sweet v. Chattanooga Electric Light Co. (Tennessee), 36 S. W. 1090, plaintiff brought suit May 15, 1895, in the Circuit Court of Hamilton County, Tennessee, for personal injuries sustained June 23, 1893. The declaration alleged that plaintiff first brought suit in the federal court on June 22, 1894, and that said suit was dismissed by the federal court for want of jurisdiction. Demurrer was interposed setting up the Statute of Limitations (Mill & V. Code, Sec. 3469) and alleging that the action in the federal court was no action in the sense of the statute inasmuch as the Court, in which it was brought, had no jurisdiction, and the action was therefore saved by the provision of Section 3448, Mill & V. Code, which provides that if the action is commenced within the term limited by statute, but judgment is rendered against the plaintiff, upon any grounds not concluding his right of action, etc., a new action may be brought **within one year after the reversal or dismissal.** The demurrer was sustained and suit dismissed. The Supreme Court, in affirming the action of the lower court, said:

> "We think the demurrer was properly sustained and the suit properly dismissed. **An action commenced in a court having no jurisdiction to entertain it is no action, in the sense of the statute. The matter stands the same as if no suit had been brought or attempted to be brought and the limitation runs from the date**

> **of the injury. If the action is brought in a court without jurisdiction the whole proceeding is void and of no effect.''** (Emphasis suppled.)

In Fairclough v. Southern Pacific Co. (N. Y. App. Div. Sup. Ct.), 157 N. Y. S. 862, it was held: Though an action was commenced before it was barred by limitations in a court which had no jurisdiction, it was not brought within the Court's jurisdiction by an amendment of the statute giving the Court jurisdiction, which amendment was enacted and became effective after the limitation period expired. The Court (page 865) said:

> ''Before that date (the date of the amendment) **no action was legally pending,** since long before the plaintiff's right to bring such an action had expired. It cannot be claimed, certainly not with any force, that the amendment gave the court jurisdiction over the action, prior to the time it took effect, as the court was without jurisdiction until that time. The commencement of the action did not prevent the statute running nor did the amendment confer jurisdiction when it did not theretofore exist.'' (Emphasis supplied.)

In Gulf C. & F. S. Ry. Co. v. Gordon (Civil Appls. Court of Texas), 218 S. W. 74, it was held the filing a petition, claiming an amount in excess of the Court's jurisdiction, was not the ''commencement'' of a suit and did not interrupt the running of a statute of limitations. In that case plaintiff filed suit in the County Court for an amount in excess of $1,000.00, the jurisdiction of said Court being limited to $1,000.0. After the limitation period expired plaintiff amended his petition by reducing the ad damnum to $800.00, so as to bring himself within the jurisdiction of the Court. It was held his **suit was not commenced by filing the first petition,** but was only commenced upon filing the amended petition, at which time the suit was barred. The Court said (page 76):

"The County Court was without jurisdiction of the cause of action declared upon in the original petition. The filing of the petition was not the 'commencement' and prosecution of the suit and did not operate as 'an interruption of limitations.' Pecos & N. T. Ry. Co. v. Rayzor, 106 Tex. 544, 172 S. W. 1103, and authorities there cited. However, the filing of * * * the amended petition * * * was the 'commencement' of a suit and did have the effect to interrupt the limitation, if the cause of action had not already been barred before it was filed."

In order that there be a "suit" pending the Court must have the authority to order a summons and must have jurisdiction of the subject matter. In the case of Fidelity Trust Company v. Gill Car Company, 25 Fed. 737, the Court, in its opinion, on page 742 said:

"Not only must there be a controversy, but as well always a form of procedure of some kind, possessing all the necessary elements of a 'suit' or 'case' in court, the most important of which is, no doubt, that there shall be a tribunal **authorized to issue** that indispensable notice which we call a writ of process, to bring the parties together in the court; and this must be not only sufficient in form and in fact, but in legal and technical effect, to constitute a 'suit' or 'case' which can only be when the tribunal undertaking the initiatory steps **is duly authorized to do that thing and proceed with the matter of adjudging between the parties.** * * * Whatever may be said as to the proper definition of the term 'suit' or 'case' in other respects, in this process of inaugurating the procedure by which the controversy is to be judicially determined there must be, ex necessitate rei, **a court having power to set in motion the machinery of the law,** and this we call its jurisdiction over the subject matter." (Emphasis supplied.)

In Schroeder v. Merchants & Mechanics Ins. Co., 104 Ill. 71, the Court said:

> "But it is apparent that a suit is not **commenced until the court has in some manner acquired jurisdiction** of something in relation to the controversy. * * * The court acquires jurisdiction of the plaintiff when he applies for its power and assistance to compel the defendant to render him his rights under the law * * * **when he puts the court or its instruments in motion under his claim his action is commenced.** * * * Jurisdiction has been defined to be the power to hear and determine a case. It is coram judice whenever a case is presented which brings this power into action. * * * Now, the court is powerless to act until it acquires jurisdiction, **and plaintiff has 'commenced' his suit when he has possessed the court of jurisdiction and power to act in the case.**" (Emphasis supplied.)

In Vincent v. McElvain, 304 Ill., at page 163, the Court said:

> "It is well established by repeated decisions of this and other courts that a suit or action is **commenced** when a party puts in motion, under his claim, the instruments of the court."

It is apparent from the numerous authorities cited that a suit is not **commenced** until a plaintiff lodges his complaint in some court which has the power and authority to put in operation the machinery of the law whereby the defendant may be made to account and to render unto the plaintiff whatever may be due him. In the instant case, when the petitioner filed his suit in the City Court, the Court was powerless to act, all orders entered by the Court were void, and the summons and service thereof were void. The respondents were not required to respond to the summons. The petitioner in no way put in opera-

tion the machinery of the law. He had done nothing to bring the respondents to the bar of justice. Filing his complaint in a Justice of the Peace Court, or with the clerk of a school board or any postmaster would have had the same effect.

It is the established rule of federal procedure that removal of an action from a state court, which has no jurisdiction, to a federal court confers no jurisdiction on the federal court, even though the federal court would have had jurisdiction if the case would have been originally commenced there (Lambert v. B. & O. Ry. Co., 258 U. S. 377, 66 L. Ed 671; Venner v. Michigan Central R. Co., 271 U. S. 127, 70 L. Ed. 868; Bull v. Chicago Ry. Co., 6 Fed. [2d] 329). Petitioner's suit, being predicated upon the Federal Employers' Liability Act, it would seem that the same rule would apply where a case is transferred, by change of venue, from a state court having no jurisdiction to another state court.

The reasoning of the petitioner, that, although the Constitution prohibited the City Court from taking jurisdiction in this cause, nevertheless it had jurisdiction to enter an order changing the venue, is not sound. This is a novel argument in that the petitioner admits no jurisdiction in the City Court, yet insists that it had authority to enter a judicial order.

In conclusion, we submit: (1) That the record in this case presents no federal question; that whether or not the Circuit Court of Madison County acquired jurisdiction to hear and determine this cause, was a matter purely of local law to be determined by the state courts, and that this court is without jurisdiction to review the decision and judgment of the Supreme Court of Illinois; and (2) that petitioner's alleged cause of action was not "commenced"

in a court of competent jurisdiction within two (2) years after the same accrued, as required by Section 6 of the Federal Employers' Liability Act. For the reasons above stated, we respectfully submit that the petition for writ of certiorari filed herein should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

BENJAMIN F. BELCHER,
Petitioner,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, a Corporation,
Respondent.

No. [redacted] 25

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

BENJAMIN F. BELCHER, Petitioner, vs. LOUISVILLE AND NASHVILLE RAILROAD COMPANY, a Corporation, Respondent.	No. 682.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The alleged accident on account of which this action is brought occurred February 15, 1939, in the State of Tennessee, at the switch yards in the City of Nashville. This cause was instituted in the City Court of East St. Louis, Illinois, on June 22, 1940, and is predicated on the Federal

Employers' Liability Act. Respondent filed a motion in the City Court of East St. Louis in said cause questioning the jurisdiction of said Court of the subject matter thereof, on the ground that Section 1 of Article VI of the Constitution of Illinois 1870, limits the jurisdiction of that Court to suits arising within the city limits of East St. Louis. This motion was overruled in the City Court.

Petitioner then moved said Court to allow a change of venue of said cause to the Circuit Court of St. Clair County (R. 23), Illinois, **because said City Court had no jurisdiction of the subject matter thereof,** which motion the City Court allowed. A transcript of the alleged record in said suit in said City Court was filed in the Circuit Court of St. Clair County, Illinois, on the 10th day of August, 1942 (R. 25), nearly three and one-half years after the date of said alleged accident. Respondent appearing specially made a motion to quash the summons issued by the City Court and to dismiss the cause for the reason that the Court was without jurisdiction of the subject matter of such suit, and because its process of summons was invalid; also, because the time within which a suit predicated on the Federal Employers' Liability Act could be instituted was barred by limitation (R. 39); that said motion was allowed by the Circuit Court and said cause dismissed (R. . .); whereupon on appeal to the Supreme Court of Illinois the judgment of the Circuit Court was affirmed (384 Ill. 281). The Supreme Court of Illinois based its decision principally upon petitioner's failure to "commence" his suit in a court of competent jurisdiction. There being no "case" pending in the City Court, a court having no jurisdiction whatever, there could be no change of venue. Thereafter plaintiff petitioned for the writ of certiorari involved in this suit in this court.

I.

Respondent contends that this Court has no jurisdiction of this cause on a writ of certiorari for the following reasons:

1. The decision of the Supreme Court of Illinois rests upon a nonfederal ground which independently and adequately supports the State Court judgment. In such case this Court will not take jurisdiction.

Kalb v. Feurstein, 308 U. S. 433, 84 L. Ed. 370, 373;
Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U. S. 157, 164;
Chicago, B. & Q. Ry. v. Illinois ex rel., etc., 200 U. S. 561, 580;
West Chicago etc. R. Co. v. Illinois ex rel., etc., 201 U. S. 506, 519;
Murdock v. Memphis, 20 Wall. 590, 634;
Klinger v. Missouri, 13 Wall. 257, 263;
Lynch v. New York ex rel., 293 U. S. 52, 54;
Honeyman v. Hanan, 300 U. S. 14, 81 L. ed. 476;
Louisville Gas & El. Co. v. Coleman, 277 U. S. 32.

The opinion of the Court in Herb v. Pitcairn, 384 Ill. 237, is in itself proof that this case was decided on nonfederal grounds.

Whether or not a state court has jurisdiction of an alleged cause of action, although begun under the Federal Employers' Liability Act, does not present a federal question.

St. Louis etc. Ry. Co. v. Taylor, 210 U. S. 281, 285;
Mondou v. N. Y., N. H. etc. R. Co., 223 U. S. 1, 58;
Chambers v. B. & O. R. Co., 207 U. S. 142, 148;
John v. Paullin, 231 U. S. 583;
Manning v. Ketcham, 58 Fed. (2d) 948.

State courts derive their jurisdiction from the courts and laws of the states. The Federal Employers' Liability Act does not attempt to enlarge or regulate the jurisdiction of

state courts, but only gives an injured person the right to file suit under that Act in a state court, where such a court, under the local law, has jurisdiction to hear cases of that character, as Congress cannot confer jurisdiction upon any court which it has not created.

> St. Louis etc. R. Co. v. Taylor, 210 U. S. 281, 285;
> Chambers v. B. & O. R. Co., 207 U. S. 142, 148;
> Mondou v. N. Y., N. H. etc. R. Co., 223 U. S. 1, 58;
> Taylor v. Southern Ry. Co., 350 Ill. 139;
> Walton v. Pryor, 276 Ill. 563, 566;
> Yazoo etc. R. Co. v. Mullins, 249 U. S. 531.

The state laws and practice relative to the jurisdiction of state courts, the mode, time and manner of invoking that jurisdiction, and the rules of practice to be applied in its exercise are no less applicable when federal rights are in controversy than when the case turns entirely upon questions of local or general law.

> John v. Paullin, 231 U. S. 583;
> Callan v. Bramford, 139 U. S. 197.

The proper construction, interpretation and effect of a state statute, being a question of local law, and not a federal law, the decision of a state court thereon is not subject to review by the Federal Supreme Court on writ of error to the state court.

> Knights of Pythias v. Meyer, 265 U. S. 30;
> Hotel etc. v. Wisconsin E. R. Bd., 315 U. S. 437;
> Brinkerhoff-Faris Tr. & Sav. Co. v. Hill, 281 U. S. 673;
> Senn v. Tile Layers Union, 301 U. S. 468;
> Moore v. I. C. R. Co., 312 U. S. 630;
> 14 Am. Juris, Sec. 99, and cases cited;
> St. Louis etc. Land Co. v. Kansas City, 241 U. S. 419;
> Marine Bank v. Kalt-Zimmers Co., 293 U. S. 357.

Whether a state court has jurisdiction of a case or not is a question exclusively for the state court, and its decision

is not reviewable in the United States Supreme Court on certiorari.

Smith v. Adsit et al., 16 Wall. 185.

The City Court of East St. Louis was without jurisdiction of the subject matter of said cause for the reason it arose outside of and beyond the city limits of said city. So that petitioner's alleged cause of action was not "commenced" in said court nor in any court within the time required by Section 6 of the Federal Employers' Liability Act. So that no change of venue was possible and recovery was barred.

Sec. 6, Fed. Emp. Liability Act (Sec. 56, Title 45, U. S. C. A. 1941);
Central Vermont Ry. v. White, 238 U. S. 507;
Phillips v. Grand Trunk Ry. Co., 236 U. S. 662, 666;
Atlantic Coast Line v. Burnette, 239 U. S. 199.

No suit was commenced:

Fidelity Trust Co. v. Gill Car Co., 25 Fed. 737;
Crowley v. Southern Ry. Co., 139 Fed. 851;
Denny v. So. Pac., 263 Ill. App. 106;
Trapp v. B. & O. R. Co., 283 Fed. 655;
Sweet v. Chattanooga El. L. Co. (Tenn.), 36 S. W. 1090;
Willing v. Provident Tr. Co., 21 Fed. Sup. 237;
Walton v. Pryor, 276 Ill. 563;
Herb v. Pitcairn, 384 Ill. 237.

It is contended, therefore, there is no federal question involved in this suit, but that it was decided on a non-federal ground. At most there is only the question whether suing in a state court having no jurisdiction tolls the federal statute. That it does not is not an open question.

Borrow Steamship Co. v. Kane, 170 U. S. 100, 110;
Goldey v. Morning News, 156 U. S. 518;

Wunderlich v. National Surety Corp., 24 Fed. Sup. 645;
Swift v. Penn. etc. R. Co., 58 Fed. 858, 861;
Stephinson v. Grand Trunk etc. R. Co., 110 Fed. (2d) 405;
Walton v. Pryor, 276 Ill. 566;
St. Louis etc. R. Co. v. Taylor, 210 U. S. 281;
The Harrisburg, 119 U. S. 199, 214;
Atlantic Coast Line R. Co. v. Burnette, 239 U. S. 199;
Bell v. Wabash Ry. Co., 58 Fed. (2d) 569;
34 Am. Jurisprudence, Sec. 284;
Vaught v. V. & S. R. Co., 132 Tenn. 679, 179 S. W. 314.

II.

2. There is not drawn in question in this suit the validity of a statute of the United States nor the validity of a statute of the State of Illinois on the ground of its being repugnant to the Constitution or laws of the United States; nor is any right, title or immunity set out in any alleged errors in the Supreme Court of Illinois except inferentially in the construction of the Illinois Venue Act by the Court. It does not affirmatively appear that a federal question was ever presented or decided, or was necessary to the decision.

Brown v. Atwell, 92 U. S. 327;
Citizens Bank v. Board of Liquidation, 98 U. S. 140;
Chouteau v. Gibson, 111 U. S. 200;
New Orleans Waterworks Co. v. Louisiana, 125 U. S. 18;
Lynch v. New York, 293 U. S. 52, 55.

The United States Supreme Court has often decided that it is not enough to give such Court jurisdiction over the judgment of a state court for the record to show that a federal question was argued or presented to that court for decision. It must appear that its decision was necessary

to the determination of the cause and that it was actually decided or that the judgment as rendered could not have been given without deciding it.

Commercial Bank of Cincinnati v. Buckingham's Executors, 5 How. 344;
Lawler et al. v. Walker et al., 14 How. 154;
Railroad Company v. Rock, 4 Wall. 180;
Parmelee v. Lawrence, 11 Wall. 38;
Brown v. Atwell, 92 U. S. 327.

III.

3. There is no substantial federal question involved in this case.

The reference in the Court's decision in the Herb case, above referred to, to the Federal Employers' Liability Act, Section 6 (Title 45, Sec. 56, U. S. C. A.), if that reference be deemed of any importance to the decision of the Illinois Supreme Court, is in line with the decisions of this Court on the same question and presents nothing new.

The Harrisburg, 119 U. S. 199, 214;
Atlantic Coast Line R. Co. v. Burnette, 239 U. S. 199;
Central of Vermont Ry. Co. v. White, 238 U. S. 507.

To be reviewed on certiorari there must be a real substantial question upon which the case may be made to turn, a question essential to the jurisdiction of this Court, and if it be that the question is absolutely devoid of merit so much so as to be frivolous, or has been explicitly foreclosed by decision or decisions of this Court as to leave no room for real controversy, the petition cannot be heard here.

Equitable Life Assurance Society v. Brown, 187 U. S. 308;
New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 345, and the voluminous authorities there cited;

Contributors to Pennsylvania Hospital v. City of Philadelphia, 245 U. S. 20;
Chanute City v. Trader, 132 U. S. 210;
Richardson v. Louisville & Nashville R. Co., 169 U. S. 128;
Blythe v. Hinckley, 180 U. S. 333, 338.

This suit was decided by the Supreme Court of Illinois wholly on the question of lack of jurisdiction of the subject matter of the City Court of East St. Louis. The City Court of East St. Louis is a court of limited jurisdiction and has no jurisdiction for any purpose whatever of a suit arising without and beyond the territorial limits of the city (City of Chicago v. Cook County, 370 Ill. 306). Section 1 of Article VI of the Constitution of Illinois of 1870 is a limitation upon city courts, and it is held uniformly by the Supreme Court of Illinois that the Legislature cannot enact any law, because in violation of Article VI, Section 6, of the State Constitution, which would give city courts jurisdiction of causes not arising within the territorial limits of the city in which the court is established.

Ladies of Maccabees v. Harrington, 227 Ill. 511, 517;
Werner v. Illinois Central Railroad Company, 379 Ill. 359;
Mitchell v. Louisville & Nashville R. R. Co., 379 Ill. 522;
Smith v. Louisville & Nashville R. Co., 381 Ill. 55;
Herb v. Pitcairn, 384 Ill. 237.

QUESTION PRESENTED.

The only question here presented is whether the City Court of the City of East St. Louis had jurisdiction under the Constitution and laws of Illinois to hear and determine said cause and had jurisdiction to enter an order changing the venue of said cause to the Circuit Court of St. Clair County.

SUMMARY OF ARGUMENT FOR DENYING THE WRIT OF CERTIORARI.

1. This case was decided by the Supreme Court of Illinois on a purely nonfederal ground which independently and adequately supports the state court's judgment.

2. A state court's construction of a state statute or of the State Constitution is followed by the United States Supreme Court.

3. There was no suit pending in the City Court of East St. Louis, Illinois, in this cause, and no change of venue could be had, and the venue statute was inapplicable and not involved.

4. The fact that under the State Constitution city courts are limited in their jurisdiction to suits arising within the territorial limits of a city is not objectionable as against any Federal Constitution or federal law, and particularly as against the Fourteenth Amendment, which is not violated if all persons within the territorial limits of the respective jurisdictions of the city courts have an equal right in like cases and under like circumstances to resort to them for redress.

5. There is no contention on the part of petitioner that Section 1 of Article VI of the Constitution of Illinois is invalid; neither is it charged that the Illinois Venue Act (Sec. 36, Chap. 146, Illinois R. S. 1943) is unconstitutional or invalid. It is contended by respondent that no alleged errors in the Supreme Court of Illinois are sufficient to raise a federal question.

Where no question is raised as to the validity of a statute of the United States, but merely as to its application to the case, no federal question arises.

Cameron v. U. S., 146 U. S. 533, 36 L. Ed. 1077.

6. The basis for a writ of certiorari must be a substantial federal question. The petition herein raises no substantial federal question. If it is considered that a federal question is raised it would involve the construction of Section 6 of the Federal Employers' Liability Act, which the state court decided in line with the decisions of the United States Supreme Court, and presents nothing new, and is devoid of merit.

ARGUMENT.

Petitioner, in his application for a change of venue from the City Court of East St. Louis to the Circuit Court of St. Clair County, admits lack of jurisdiction in the City Court to try this cause. The opinion of the Supreme Court, in the case of Belcher v. Louisville & Nashville Railroad Company, refers to the Herb case, above noted, for the reasons for its decision, the two cases having been at the same term in the Illinois Supreme Court, and involving the same questions.

In the Herb case (384 Ill. 237) the Court expressly stated in its opinion that it had been determined that city courts in Illinois were without jurisdiction to hear and determine the subject matter of any action the cause of which arose outside of the territorial limits of the City Court in which the action was pending, and

> "the material point for consideration is whether the plaintiff has commenced an action within two years of the date of his injury in a court having jurisdiction to hear and determine the same. * * * The question involved relates to the effect of the proceedings had in a court wholly incompetent to render a valid judgment because, if the judgment to be rendered would be void, it necessarily follows the preliminary proceedings of the court necessary to rendition of judgment must likewise be void. If the court has no jurisdiction of the subject matter for judgment there can be no jurisdiction giving effect to process or pleadings. If judgment had been entered in the city court it would have been absolutely void."

And the Court, in this opinion, said further:

> "If the ultimate object to be obtained in a suit at law, namely, a judgment, is utterly void, it is difficult to understand how any of the preliminaries to such a judgment, such as summons, pleadings, interlocutory

> orders and the like, have any effect when the result, had such proceeding been completed in the first court, would have been a nullity."

The Court in this case further held:

> "It is clear a suit was not commenced by filing the present suit in the City Court of Granite City by issuing summons or filing a complaint. Lacking requisite jurisdiction because of the provisions of the Constitution limiting it to cases arising within the limits of the city such Court was wholly incompetent to render any judgment or to authorize any proceedings which would result in a judgment. When the case was transferred to the Circuit Court of Madison County some five years after the date of the accident by the filing of the transcript of orders entered in the City Court and the pleadings and other documents (likewise applicable to this, the Belcher case), **there was no commencement** of a suit, but only the receipt of papers from a court in which it was impossible to commence one because of its lack of jurisdiction. To hold the suit was started in the Circuit Court at the time when it was attempted to be commenced in the City Court is not only to decide something which is obviously not the fact, but also to give effect to the proceedings in another court which up to that time must be considered a nullity. To so hold would, in effect, revive a cause of action already barred by limitations and deprive the defendant of a vested right. Cooley's Constitutional Limitations, page 448."

The Court in its opinion then added:

> "This determination makes it unnecessary to pass upon either the constitutional question involved or the validity of the change of venue statute."

In this connection, it is respondent's contention that the case in the Supreme Court of Illinois was decided on the question of jurisdiction wholly, and that neither the Constitution nor any statute of the United States was involved

and that the decision rests wholly upon a nonfederal ground which independently and adequately supports the judgment.

Where the decision of the state court is deemed to rest upon a nonfederal ground which independently and adequately supports the state court judgment, this Court will not exercise jurisdiction to review notwithstanding the raising of federal questions upon the state court record or the decision of those questions by the state court.

Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U. S. 157, at 164;
Chicago, B. & Q. Ry. v. Illinois ex rel. etc., 200 U. S. 561, 580;
West Chicago etc. R. Co. v. Illinois ex rel. etc., 201 U. S. 506, 519;
Murdock v. Memphis, 20 Wall. 590, 634;
Klinger v. Missouri, 13 Wall. 257, at 263;
Lynch v. New York ex rel., 293 U. S. 52, at 54

It is apparent from the reading of the decision in the Herb case above cited that the Supreme Court of Illinois held that no suit had been instituted in the City Court of Granite City (also applicable to the City Court of East St. Louis in the instant case); and that there was nothing to transfer to the Circuit Court; the Court also said that a suit involving the Federal Employers' Liability Act must, within two years, be instituted in a court of competent jurisdiction. It is apparent that this was not done and the Court held that the filing of the papers in the Circuit Court after the limitation period provided in Section 6 of the Federal Act would be ineffective because barred. This statement of the Supreme Court of Illinois was not necessary to its decision, but even so, what the Court there said is in line with the decisions of this Court that the condition of liability depends upon the institution of such a suit in a court of competent jurisdiction within the two-year period, even if such transfer of papers would

be considered the institution of a suit. No state statute or decision can serve to extend the period for filing the suit provided in the Act of Congress.

Removal of action from a state court, which has no jurisdiction, to a federal court, confers no jurisdiction on the federal court.

Venner v. Michigan Cent. R. Co., 271 U. S. 127.

"If the state court lacks jurisdiction of the subject matter or of the parties, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction."

Lambert Co. v. Balt. & Ohio R. R. Co., 258 U. S. 377, 382;

Bull v. Chicago, M. & St. P. Ry. Co., 6 Fed. (2d) 329, 332.

A federal court has no jurisdiction of a case removed from a state court, unless the state court from which it was removed had jurisdiction of the subject matter of the suit.

Compton v. Carter Oil Co., 283 Fed. Rep. 22.

A federal court cannot acquire jurisdiction by removal on the ground of diversity of citizenship of a cause of which the state court was without jurisdiction.

Richter v. E. St. Louis & Sub. Ry. Co., 26 Fed. Rep. (2d) 220.

"An action commenced in a court having no jurisdiction to entertain it is no action, in the sense of the statute. The matter stands the same as if no suit had been brought or attempted to be brought, and the limitation runs from the date of the injury. If the action is brought in a court without jurisdiction, the whole proceeding is void and of no effect; and if it should proceed to judgment, the judgment likewise is void and without validity."

Sweet v. Chattanooga Elec. Light Co., 36 S. W. 1090.

> The courts of the United States upon removed cases have no wider jurisdiction than have the courts of the state from which they were removed. The removal simply transfers the hearing from the state to the national tribunal, but does not enlarge the right of the court to hear the cause.
>
> Swift v. Philadelphia etc. R. Co., 58 Fed. 858, 861.

The same principle is equally applicable to state courts.

> State courts derive their jurisdiction from the constitution and laws of the state and do not derive any power from the laws of the United States and Congress cannot confer jurisdiction upon a state court or any other court which it has not ordained and established.
>
> Walton v. Pryor, 276 Ill. 566;
> St. Louis & Iron Mountain R. Co. v. Taylor, 210 U. S. 281.

In order to give this court jurisdiction it must affirmatively appear not only that a federal question was presented for decision to the Illinois Supreme Court, but that its decision was necessary to the determination of the cause or that the judgment could not have been rendered without deciding a federal question.

> Brown v. Atwell, 92 U. S. 327;
> Citizens Bank v. Board of Liquidation, 98 U. S. 140;
> Chouteau v. Gibson, 111 U. S. 200;
> New Orleans Waterworks Co. v. Louisiana, 125 U. S. 18.

The transcript of the record in this cause does not show what errors were assigned to the Supreme Court of Illinois on the appeal, and is entirely blank as to the contention made on the appeal of this suit to the Supreme Court of Illinois. The only error complained of is shown by the petition for a rehearing in such Supreme Court, and this

petition contends wholly for a construction of the Venue Act of the state to the effect that the City Court of East St. Louis had authority to enter an order changing the venue. This is not a federal question, but contends for and relates wholly to an interpretation by the Supreme Court of a state law. The Court held that no suit was commenced in the City Court of East St. Louis in this cause, and therefore no change of venue could be had because the City Court was wholly without jurisdiction to entertain the cause. The Supreme Court of Illinois has held uniformly for a period of more than eighty-five years, beginning with the case of The People v. Evans, 18 Ill. 361, which was decided in 1857, that city courts created under Section 1 of Article VI of the Constitution of Illinois (and under the corresponding section of the Constitution of 1848) have no jurisdiction whatever of the subject matter of a suit originating beyond the corporate limits of the city. We deem it unnecessary to cite all of the cases but they include:

the Werner case, 379 Ill. 559;
the Mitchell case, 379 Ill. 522;
the Smith case, 381 Ill. 55;
the Belcher case, 384 Ill. 281, and the case of Herb v. Pitcairn, 384 Ill. 237.

So that the decision in the Belcher case by the Supreme Court is in line with the uniform holding as to Section 1 of Article VI of the Illinois Constitution.

In the construction of the Constitution and laws of a state, the United States courts follow the decisions of the highest court of the state.

Klinger v. Missouri, 13 Wall. 257, 263;
Enterprise Irrigation Dist. v. Farmers Mutual Canal Co., 243 U. S. 157, 164;
14 Am. Jur., Sec. 99, pp. 313-317, and cases there cited;
14 Am. Jur., Sec. 109, pp. 325-330;

Marine Bank v. Kalt-Zimmers Co., 293 U. S. 357, 366;
Louisville Gas & Electric Co. v. Coleman, 277 U. S. 32;
Forsyth v. Hammond, 166 U. S. 506, and authorities cited on page 519.

Petitioner concedes that the City Court was without jurisdiction of the Belcher case, yet contends that the Court had power and authority to consider an application for a change of venue—a **judicial act** necessarily—for, if not a judicial act, the court clerk or court bailiff or any individual could enter the order. We respectfully state that this position is absurd and is unsupported by authority.

Herb v. Pitcairn, 384 Ill. 237;
Fidelity Trust Co. v. Gill Car Co., 25 Fed. 737;
Crowley v. Southern Ry. Co., 139 Fed. 854;
Swift v. Phila. etc. R. Co., 58 Fed. 858, 861.

The validity of a federal statute or treaty is not denied by the mere denial of rights claimed under the statutes or treaty, for such denial may result from mere construction of the statute and its application to the facts of the cause.

Fairy v. King County, 141 U. S. 668, 673;
South Carolina v. Seymour, 153 U. S. 353, 360;
Telluride Power etc. Co. v. Rio Grande etc. Ry. Co., 175 U. S. 639, 647.

With the question whether the state statute is invalid under the State Constitution, the Supreme Court has nothing to do.

Haire v. Rice, 204 U. S. 291, 301;
Smith v. Jennings, 206 U. S. 276;
Southwestern Oil Co. v. Texas, 217 U. S. 114;
Brown-Forman Co. v. Kentucky, 217 U. S. 563, 569.

The question how the State statute shall be construed is solely for the State Court and the Supreme Court must accept the decision of the highest court of the State fixing the meaning of the State legislation as though such meaning had been specifically expressed therein. If the cause involves nothing more than the proper construction of a State statute the Supreme Court has no jurisdiction whatever, either on appeal or on certiorari.

Supreme Lodge Knights of Pythias v. Meyer, 265 U. S. 30, 32, 44 S. Ct. 432;
Quong Ham Wah Co. v. Industrial Accident Commission etc., 255 U. S. 445, 448, 41 S. Ct. 373;
Yazoo & M. etc. R. Co. v. Adams, 180 U. S. 41;
Ross v. Oregon, 227 U. S. 150, 161, 33 S. Ct. 220.

The rule is that if though a federal question was involved in controversy, and was presented to the State Court, that court's decision may be regarded as based upon an independent adequate nonfederal ground broad enough to sustain its judgment, this defeats the Supreme Court's jurisdiction to review.

Lynch v. State of New York ex rel. etc., 293 U. S. 52, 54, 55 S. Ct. 16.

It rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction and the rules of practice to be applied in its exercise, and the state law and practice in this regard are no less applicable when federal rights are in controversy than when the case turns entirely upon the questions of local or general law.

John v. Paullin, 231 U. S. 583, 585.

The equal protection clause of the Fourteenth Amendment is not violated by diversity in the jurisdiction of the several courts of a state as to subject matter or finality of decision, if all persons within the territorial limits of the

respective jurisdiction of the state courts have an equal right in like cases under like circumstances to resort to them for redress. A state may establish one system of courts for cities and another for rural districts, one system for one portion of its territory and another system for another portion. This was done in Illinois having reference particularly to city courts.

State of Ohio v. Akron etc. Park District, 281 U. S. 74;
Missouri v. Lewis, 101 U. S. 22, 30;
Pittsburgh etc. Ry. Co. v. Backus, 154 U. S. 421, 427;
Mallett v. North Carolina, 181 U. S. 589, 597.

The United States Supreme Court on writ of error must accept as final the ruling of the State Court of last resort on all matters of state law.

Fox River Paper Co. v. R. R. Com., 274 U. S. 651;
Ganer v. N. Y., 206 U. S. 536;
Kaukauna Power Co. v. Green Bay etc., 142 U. S. 254, 272;
Brinkerhoff Faris Tr. & Inv. Co. v. Hill, 281 U. S. 680.

Petitioner has cited, in support of his contention that the City Court of East St. Louis had a limited jurisdiction for the purpose of changing the venue of this suit, the case of Central Illinois Public Service Co. v. The Industrial Commission, 293 Ill. 62. This case has been cited in this litigation from the very beginning, and was cited in the Supreme Court of Illinois at the hearing of this suit on appeal. This Public Service Company case was instituted in a circuit court in a county in which the defendant was not a resident, but was a resident of an adjoining county. Service could not be had upon him in the county where the suit was brought. Under the provisions of the Venue Act of the state, a change of venue was allowed, but this change of venue was allowed by one circuit court to an-

other circuit court, both constitutional courts, and furnishes no precedent or support for the contention of petitioner. The Supreme Court of Illinois distinguished that case from this by saying:

> "The distinction to be drawn is that if a case is improperly filed in a court having jurisdiction of the cause generally, but without its territorial jurisdiction, it may be transferred to the proper circuit court. But if the cause is filed in a court which could never lawfully acquire jurisdiction, the transfer to the court which would have had jurisdiction gives no validity to the proceedings in the first court. We think the interpretation of the venue statute in the Gill case conclusively is against appellant."
>
> Herb v. Pitcairn, 384 Ill. 237.

There is also the additional reason why the Venue Act cannot apply in the instant case, in that to apply a state statute to a city court for the purpose of giving it jurisdiction that it does not now have would violate Section 1 of Article VI of the Constitution of Illinois. The Supreme Court of Illinois has held repeatedly that the Legislature has no power to increase the jurisdiction of the City Court because of the limitation fixed in the State Constitution.

> Ladies of Maccabees v. Harrington, 227 Ill. 511, 517; People v. Evans, 18 Ill. 361.

So that our contention is that it is apparent that the City Court of East St. Louis had no jurisdiction of this cause for any purpose; that a suit was not "commenced" in the City Court, was not pending there, and, therefore, there was nothing to transfer to the Circuit Court.

A city court in Illinois is wholly different from a circuit court, which is a constitutional court, and subject to the enactment of laws by the Legislature for its control and direction, as well as to its jurisdiction. There is no constitutional limitation of the jurisdiction of circuit courts

as there is of city courts, and the enactment of laws by the Legislature authorizing circuit courts to change the venue by virtue of Section 36 of the Venue Act is valid as to such circuit courts, and is not valid as to city courts in cases not arising within its territorial limits and of which it has no jurisdiction, for the simple reason that the Legislature is powerless to add to the city courts' jurisdiction that which is forbidden by the Constitution. A city court is a court of limited jurisdiction and there are no assumptions or intendments in favor of its jurisdiction not expressed in the law, as there is in the case of a circuit court.

It is undoubtedly true that a superior court of general jurisdiction proceeding within the general scope of its powers, is presumed to act rightly. All intendments of law in such cases are in favor of its acts. It is presumed to have jurisdiction to give the judgments it renders until the contrary appears. And this presumption embraces jurisdiction not only of the cause or subject matter of the action in which the judgment is given, but of the parties also. * * * This is a familiar law, and is asserted by all the adjudged cases. The rule is different with respect to courts of special and limited authority; as to them, there is no presumption of law in favor of their jurisdiction; that must affirmatively appear by sufficient evidence or proper averment in the record or their judgments will be deemed void on their face.

Galpin v. Page, 85 U. S. (Wall. 18) 350, 365;
Brown v. Van Keuren, 340 Ill. 118;
Kenney v. Greer, 13 Ill. 432;
Dowling v. Stewart, 3 Scam. 103;
Shufeldt v. Shufeldt, 45 Ill. 223;
Hook v. Wright, 329 Ill. 299;
Keal v. Rhydderck, 317 Ill. 232;
Musselman v. Paragnik, 317 Ill. 597;
Oakman v. Sinall, 282 Ill. 353.

Practically every position taken by petitioner is answered fully by the decision in the case of Herb v. Pitcairn, 384 Ill. 237. The Court in its opinion in this suit states that "our disposition of the identical issue in Herb v. Pitcairn is decisive here." This reference perhaps does not make the Herb opinion a part of the record in this suit, and the same is not included in the record here. For the convenience of the Court we have attached hereto as an appendix a copy of the opinion rendered by the Supreme Court of Illinois in the cause of Herb v. Pitcairn.

Respondent submits that the writ of certiorari should be denied, and prays that the Court so order.

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APPENDIX.

Opinion of Supreme Court of Illinois

(384 Ill. 237)

in

Victor J. Herb, Appellant, v. Norman B. Pitcairn et al., Receivers for Wabash Railway Company, Appellees.

Mr. Justice Gunn delivered the opinion of the court:

The appeal in this case is taken by the plaintiff, Victor J. Herb, from the judgment of the circuit court of Madison county sustaining the defendants' motion to dismiss, and entering final judgment of dismissal in favor of defendants-appellees. Among the grounds urged before the circuit court as a basis for such dismissal was the unconstitutionality of a statute, as shown by the certificate of the trial judge, which would give us jurisdiction of the direct appeal, whether or not the case was decided upon that point. Groome v. Freyn Engineering Co. 374 Ill. 113.

The facts in the case are substantially as follows: The plaintiff was an employee of the receivers of the Wabash Railway Company, and December 22, 1937, commenced an action in the city court of Granite City, Illinois, against the defendants stating a cause of action under the Federal Employers' Liability Act for injuries claimed to have been sustained in the city of Decatur, Illinois, November 23, 1936. The defendants answered denying the allegations of the complaint and setting up other defenses. The cause was tried in the city court in October, 1938, and resulted in a verdict in favor of the plaintiff, which was set aside upon a motion by the defendants for judgment notwithstanding the verdict.

The plaintiff appealed to the Appellate Court, where the cause was reversed and remanded, which action was affirmed by this court in Herb v. Pitcairn, 377 Ill. 405.

After the cause had been redocketed, but before it was tried, the cases of Werner v. Illinois Central Railroad Co. 379 Ill. 559, and Mitchell v. Louisville and Nashville Railroad Co. 379 Ill. 522, were decided by this court, in which it was held and determined the city courts in Illinois were without jurisdiction to hear and determine the subject matter of any action, the cause of which arose outside of the territorial limits of the city court in which the action was pending. After learning of these decisions the plaintiff filed a motion in the city court of Granite City for a change of venue to the circuit court of Madison county, under the provisions of the statute purporting to authorize a change of venue of a suit commenced in the wrong court or county to the proper court or county, as in cases of change of venue. (Ill. Rev. Stat. 1941, chap. 146, par. 36.) The motion for change of venue was allowed by the city court and the venue ordered changed to the circuit court of Madison county, and on July 31, 1942, all of the pleadings and papers, and a certified transcript of all orders in said cause in the city court of Granite City were duly filed in the circuit court of Madison county, as on change of venue.

August 21, 1942, appellees filed in the circuit court of Madison county their motion to dismiss plaintiff's cause for the following reasons: That since the city court of Granite City had no jurisdiction of the case because it appeared the cause of action accrued outside of the territorial limits of Granite City (1) all orders entered, and all proceedings had in the city court of Granite City, including the order changing the venue thereof, were void and of no effect; (2) that the statute authorizing a city court to change the venue of an action of which it has no jurisdiction to a court having jurisdiction is contrary to section 1 of article VI of the constitution, and therefore void; and (3) said cause having been transferred on change of venue on July 17, 1942, more than two years after the date of the

injury, November 23, 1936, the plaintiff could not maintain his action because it had not been commenced within two years from the date of his injury in a court having jurisdiction to hear and determine the same.

The circuit court of Madison county sustained the motion of appellees to dismiss plaintiff's suit, and November 27, 1942, entered judgment that the plaintiff take nothing, and that the defendants recover costs. After the entry of judgment the judge of the circuit court signed a certificate that there was involved in the said final order and judgment the construction of the constitutions of the State of Illinois and of the United States, and the validity of a statute, (Ill. Rev. Stat. 1941, Chap. 146, par. 36,) and also the validity, construction and application of a Federal statute, viz., section 6 of the Federal Employer's Liability Act as amended. Section 56, Title 45, U. S. C. A. 1941.

The material point for consideration is whether the plaintiff has commenced an action within two years of the date his injury in a court having jurisdiction to hear and determine the same, as required by section 6 of the Federal Employers' Liability Act, by transferring the cause from a court having no jurisdiction over it at a date which, if then originally filed in the latter court, could not be maintained because not filed within the statutory time. The question involved relates to the effect of the proceedings had in a court wholly incompetent to render a valid judgment, because if the judgment to be rendered would be void it necessarily follows the preliminary proceedings of the court, necessary to rendition of judgment, must likewise be void. If the court has no jurisdiction of the subject matter for judgment there can be no jurisdiction giving effect to process or pleadings. If judgment had been entered in the city court it would have been absolutely void. (Werner v. Illinois Central Railroad Co. 379 Ill. 559; Mitchell v. Louisville and Nashville Railroad Co. 379 Ill. 522.) The act of a tribunal beyond its jurisdiction is null

and void whether without its territorial jurisdiction or beyond its powers. (Welton v. Hamilton, 344 Ill. 82.) A judgment void upon its face and requiring only an inspection of the record to demonstrate its invalidity is a mere nullity, in legal effect no judgment at all, conferring no right and affording no justification. (Voorhees v. Bank of the United States, 10 Pet. 475, 9 L. ed. 501.) Nothing can be acquired or lost by it; it neither bestows nor extinguishes any right. (Johnson v. Carroll, 190 Ky. 689, 228 S. W. 412; Abernathy v. Missouri Pacific Railway Co., 287 Mo. 30, 228 S. W. 486.) It can be attacked at any time, even in the first instant on appeal. (Campbell v. Porter, 162 U. S. 478, 40 L. ed. 1044; Perez v. Fernandez, 202 U. S. 80, 50 L. ed. 942.) And it may not be validated either by waiver or consent. (Windsor v. McVeigh, 93 U. S. 274, 23 L. ed. 914.) Where there is a want of authority over the subject matter the judgment is open to successful impeachment, if such fact is made to appear from the face of the record or by matters dehors, where extraneous evidence is receivable for the purpose. Armstrong v. Obuchon, 300 Ill. 140; Rabbitt v. Weber & Co., 297 Ill. 491.

It is the element of jurisdiction that differentiates a void from a voidable judgment; both the subject matter and the parties must be before the court, and jurisdiction of the one without the other will not suffice; the two must concur or the judgment will be void in any case in which the court assumes to act. (Rabbitt v. Weber & Co. 297 Ill. 491). And we have further held that even a court of general jurisdiction has no power to do any act or render any judgment affecting persons or property, unless the particular act or judgment is brought within its jurisdiction according to law. (People ex rel. Brundage v. Righeimer, 298 Ill. 611.) These are general principles upon which substantially all courts are in agreement.

Applying now these principles to the facts before us we observe recovery under the Federal Employers' Liability

Act is conditioned upon two things: (1) commencing an action within two years from the date of the injury; and (2) commencing such action in a court having jurisdiction to hear and determine the same. It has been held by the Federal authorities that section 6 of the Federal Employers' Liability Act is not a statute of limitations pertaining to the remedy, but is a condition of liability constituting a substantial part of the right created. (Central Vermont Railway Co. v. White, 238 U. S. 507, 59 L. ed. 1433; Phillips v. Grand Trunk Railway Co. 236 U. S. 662, 59 L. ed. 774; Bell v. Wabash Railway Co. 58 Fed. (2) 569; Atlantic Coast Line Railway Co. v. Burnette, 239 U. S. 199, 60 L. ed. 226.) The plaintiff having predicated his case upon the Federal Employers' Liability Act must comply with its provisions, both with respect to the time of commencing the suit and of bringing it in a court having jurisdiction to hear and determine it.

While the appellant does not precisely so state, apparently it is his contention that, having begun the suit in a court without jurisdiction of the subject matter but having changed the venue thereof and transferred it to one that would have jurisdiction, the date of the transfer to the latter court would relate back to the time of filing it in the court not having jurisdiction, thus giving the order changing the venue the effect of having a case continuously pending in the court of proper jurisdiction from the time the action was commenced in the one not having it. The fallacy of this argument rests in the fact that it becomes necessary to give validity to proceedings in a court, the judgment of which, if rendered upon such proceedings, would be wholly void. If the ultimate object to be obtained in a suit at law, viz., a judgment, is utterly void, it is difficult to understand how any of the preliminaries to such a judgment, such as summons, pleadings, interlocutory orders and the like have any effect, when the result, had such proceeding been concluded in the first court, would have been a nullity.

A case in point is illustrated by the facts in Crowley v. Southern Railway Co., 139 Fed. 851. The Alabama legislature had attempted to create a circuit court with different divisions, but the act creating it was held unconstitutional in Ex rel. Birmingham and Atlanta Railway Co., 42 So. 118. In the Crowley case the cause of action was claimed to be saved because a summons had been issued out of such illegal division of the circuit court, but in commenting upon the effect of this summons the court said: "The act constituting the southern division of the circuit court of St. Clair county at Pell City being unconstitutional, there was no authority for filing the summons and complaint with Smith or anybody else at Pell City. The issue of the summons to appear before a court or at a time not authorized by law was a nullity, and so was the service of the summons. What was done in this matter at Pell City was as ineffectual to constitute a 'suit' in the real circuit court of St. Clair county as if the plaintiff had filed the summons and complaint with some merchant at Pell City and procured him to hand them to the defendants." In substance the same has been held in Inter Southern Life Insurance Co. v. Pierce, 31 S. W. (2) 692; Willing v. Provident Trust Co., 21 Fed. Supp. 237; Manning v. Ketchem, 58 Fed. (2) 948, and stated in the text of Cor. Jur. Sec. Vol. 21, pages 177 and 178. And in Vincent v. McIlvain, 304 Ill. 160, at 163, it is said a suit or action is commenced when the party puts in motion, under his claim, the instruments of a court of general jurisdiction.

When the present suit was filed in the city court of Granite City the defendants could have disregarded the summons, and judgment rendered in such court would have been without effect and no justification for seizing defendants' property on execution. Yet, if appellant's contention is sustained, a valid judgment could be obtained by transferring the cause to the proper court upon a summons or notice that defendants could safely disregard

when served upon them. This would give the order of transfer by the city court the effect of vitalizing process that was void and considering a case commenced and pending in a proper court during a period when, in legal contemplation, no judicial control of defendants had yet been exercised.

Conceding, but not deciding, that in proper cases a court without jurisdiction of the subject matter could by statute be authorized to transfer its proceedings to a court having jurisdiction, still the condition that the action be commenced within two years is not met. A like situation has been presented under statutes extending time for bringing suit where an action has been commenced but the plaintiff nonsuited, as illustrated by section 24 of the Limitations Act. (Ill. Rev. Stat. 1941, chap. 83, par. 24a.) Under the conditions present in this case it has been held such statutes cannot recreate a right given under a Federal statute that has ceased to exist by the terms of the (Federal) statute. (Bell v. Wabash Railway Co., 58 Fed. [2] 571; Denny & Co. v. Southern Pacific Co., 263 Ill. App. 106; Sweet v. Chattanooga Elec. Lt. Co. (Tenn.), 36 S. W. 1090; Gulf, O. & F. S. Railway Co. v. Gordon, 218 S. W. (Texas) 74; Fidelity Trust Co. v. Gill Car Co., 25 Fed. 737.) In the last case the language used covers precisely the present situation when it is said: "Not only must there be a controversy, but as well always a form of procedure of some kind, possessing all the necessary elements of a 'suit' or 'case' in court, the most important of which is, no doubt, that there shall be a tribunal authorized to issue that indispensable notice which we call a writ of process, to bring the parties together in court; and this must be not only sufficient in form and in fact, but in legal and technical effect, to constitute a 'suit' or 'case' which can only be when the tribunal undertaking the initiatory steps is duly authorized to do that thing and to proceed with the matter of adjudging between the

parties. * * * There must be ex necessitate rei, a court having power to set in motion the machinery of the law, and this we call its jurisdiction over the subject matter."

Appellant calls our attention to Central Illinois Public Service Co. v. Industrial Com., 293 Ill. 62, as supporting his claim that the want of jurisdiction of the Granite City city court did not prevent its properly being in the circuit court of Madison county for all purposes. In that case we held the venue statute in Illinois, as applying to a circuit court having no jurisdiction over the subject matter, has no other purpose than to authorize a transfer to another circuit court which had, but does not affect any of the other rights of the parties. This case was so interpreted in Gill v. Lynch, 367 Ill. 203. In the case last cited a receiver had been appointed in the county court under the so-called Skarda Act. (Laws of 1933, p. 874.) The act was later held unconstitutional. A petition was then filed to transfer the venue of the case to the circuit court. The question arose as to the effect of the appointment of the receiver in the county court after the case had been transferred to the circuit court. The question presented for decision was set out as follows: "The question in the case is whether or not the appointment of a receiver for real estate by a county court having no jurisdiction of the subject matter, is validated by a subsequent transfer of the cause to the proper court, under the provisions of the statutes relating to venue." The circuit court held the plaintiff, county treasurer, could not recover anything held by his predecessor in office as receiver under appointment by the county court because the proceeding was absolutely void. In affirming that decision we held that the appointment of a receiver in the county court and all subsequent orders, except the one transferring the cause, were void. And among other things we said: "The effect of proceedings in courts having jurisdiction of the subject matter is not material here. Principles applicable to such

cases have no bearing where the court has no jurisdiction to entertain the cause. It is a cardinal principle of the law that void proceedings are without any force or effect, and are always subject to attack, either directly or collaterally. Neither section 16, nor the act of 1891, contains any provision that, by the most liberal interpretation, can be construed as validating void judgments or proceedings." The distinction to be drawn is that if a case is improperly filed in a court having jurisdiction of the cause generally but without its territorial jurisdiction, it may be transferred to the proper circuit court. But, if the cause is filed in a court which could never lawfully acquire jurisdiction, the transfer to a court which would have had jurisdiction gives no validity to the proceedings in the first court. We think the interpretation of the venue statute in the Gill case conclusively is against appellant.

It is clear a suit was not commenced by filing the present suit in the city court of Granite City or by issuing summons or filing a complaint. Lacking requisite jurisdiction because of the provisions of the constitution limiting it to cases arising within the limits of the city, such court was wholly incompetent to render any judgment or to authorize any proceedings which would result in a judgment. When the case was transferred to the circuit court of Madison county, some five years after the date of the accident, by the filing of the transcript of orders entered in the city court, and the pleadings and other documents, there was no commencement of a suit, but only the receipt of papers from a court in which it was impossible to commence one because of its lack of jurisdiction. To hold the suit was started in the circuit court at the time when it was attempted to be commenced in the city court is not only to decide something which is obviously not the fact, but also to give effect to the proceedings in another court, which up to that time must be considered as a nullity. To so hold would in effect revive a cause of action already

barred by limitations and deprive the defendant of a vested right. Cooley's Constitutional Limitations, p. 448.

In this case jurisdiction of the suit was wholly lacking until July 31, 1942 (if we consider the change-of-venue act valid), and at this time the condition imposed upon the plaintiff with respect to bringing his suit had expired by lapse of time. This determination makes it unnecessary to pass upon either the constitutional question involved or the validity of the change-of-venue statute.

It is our conclusion the judgment of the circuit court of Madison county in dismissing the suit and entering judgment against the appellant was correct, and its judgment is accordingly affirmed.

Judgment affirmed.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

Nos. 24 and 25 (Consolidated).

VICTOR J. HERB,
Petitioner,
vs.
NORMAN B. PITCAIRN and FRANK C. NICODEMUS, JR., Receivers for Wabash Railway Co.,
Respondents.
No. 24.

BENJAMIN F. BELCHER,
Petitioner,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Respondent.
No. 25.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

Nos. 24 and 25 (Consolidated).

VICTOR J. HERB, Petitioner, vs. NORMAN B. PITCAIRN and FRANK C. NICODEMUS, JR., Receivers for Wabash Railway Co., Respondents.	No. 24.
BENJAMIN F. BELCHER, Petitioner, vs. LOUISVILLE & NASHVILLE RAILROAD COMPANY, Respondent.	No. 25.

BRIEF FOR RESPONDENTS.

MAY IT PLEASE THE COURT:

INTRODUCTION.

By order of this Court, the above cases have been consolidated. The respondents in each case filed briefs in opposition to the respective petitions for certiorari. Respondents desire such briefs to be considered in the deter-

mination of these causes. However, petitioners have filed in this Court a brief which is substantially a repetition of what was said in their petitions. Respondents, although their answers to the petitions fully answer all that is said in the new brief, have deemed it advisable to file this brief in order, fully, in more detail and in one connected brief, to present their position in this Court. In the course of the argument we shall set forth petitioners' contentions and shall answer each and all of them.

THE DECISIONS IN THE COURT BELOW.

The decision of the Supreme Court of Illinois in No. 24, Herb v. Pitcairn et al., is reported in 384 Ill. 237, and appears in the printed record in that case (H. R. 25 et seq.).*

The decision of the Supreme Court of Illinois in No. 25, Belcher v. L. & N. R. R. Co., is reported in 384 Ill. 281, and appears in the printed record in that case (B. R. 25 et seq.).

STATEMENT OF THE CASES.

Petitioners' statement of the cases is so incomplete that we deem it better, in order that this Court may have before it the pertinent and material facts in a full and connected manner, briefly to restate the facts in each case.

In No. 24, the Herb case, petitioner, as plaintiff, on December 22, 1937, filed in the City Court of Granite City, Illinois, his complaint against respondents in that case, as defendants (H. R. 5), under the Federal Employers' Liability Act (U. S. C. A., Title 45, Secs. 51-59), for personal injuries sustained by petitioner on November 23, 1936, at or near the city of Decatur, Illinois (outside the city limits of the city of Granite City), alleging in said com-

*For convenience, the printed record in No. 24, the Herb case, will hereafter be referred to as H. R. and the printed record in No. 25, the Belcher case, will hereafter be referred to as B. R.

plaint a violation by respondents of the Federal Safety Appliance Act (U. S. C. A., Title 45, Secs. 1-16) relating to handbrakes. A summons was issued by said City Court and served upon respondents and answer filed by them. The cause was tried in the City Court, and judgment rendered in favor of respondents which was reversed by the Supreme Court of Illinois and the cause remanded to the City Court for a new trial.

Thereafter, on March 16, 1942, the Supreme Court of Illinois filed opinions in two cases then pending in said Court, namely, Werner v. Illinois Central R. R. Co., 379 Ill. 559, 42 N. E. (2d) 82, and Mitchell v. Louisville & Nashville R. Co., 379 Ill. 522, 42 N. E. (2d) 86, in each of which cases said Supreme Court of Illinois held that the various city courts in Illinois were without jurisdiction to hear and determine the subject matter of any action the cause of which arose outside of and beyond the territorial limits of the city in whose city court such action was attempted to be commenced. After learning of these decisions, petitioner, on June 17, 1942, about four and one-half years after his alleged cause of action accrued, filed a motion in the City Court of Granite City for a change of venue to the Circuit Court of Madison County, Illinois, under the provisions of an Illinois Statute known as the Venue Act (Ill. Rev. Stat., Chap. 146, par. 36, p. 3226),* purporting to authorize a change of venue of a suit attempted to be commenced in the wrong court or county to a proper court or county. In this motion (R. 18) petitioner stated: "This suit or action has been commenced, and is pending in the wrong court, and the venue thereof should be changed to a proper court pursuant to the terms and provisions of Chap. 146, Par. 36, Illinois Revised Statutes 1941." No other relief was prayed for in said motion and the asserted authority to change the

*Ill. Rev. Stat., where cited herein, at all times refers to "Illinois Revised Statutes, State Bar Association Edition 1943."

venue of this case from said City Court to said Circuit Court was based solely upon said last mentioned statute, which will be hereafter quoted and commented on in our argument.

On July 17, 1942, petitioner's motion for change of venue was allowed by said City Court and the venue ordered changed to the Circuit Court of Madison County, Illinois (H. R. 5), and on July 31, 1942, more than five years after petitioner was injured, and more than four years after filing his complaint in said City Court, all of the pleadings and papers and a certified transcript of all orders in said cause, in the City Court of Granite City, were filed in the Circuit Court of Madison County as on change of venue (H. R. 5).

On August 21, 1942, respondents filed in said Circuit Court their motion to dismiss petitioner's alleged cause of action (H. R. 18). This motion was based principally upon two grounds, namely: (1) That all orders entered, and all pleadings had, in the City Court of Granite City, including the order changing the venue thereof, were void and of no effect; and that the statute (Ill. Rev. Stat., Chap. 146, par. 36), which it is claimed authorizes a city court to change the venue of an action of which it has no jurisdiction to a court having jurisdiction (if it so purports or is construed to permit such change of venue), is contrary to Sec. 1 of Article VI of the Illinois Constitution and is therefore void; and (2) that plaintiff did not "commence" his suit in a court having jurisdiction of the subject matter or in any court of competent jurisdiction within two years from the date he sustained his injuries, as required by Sec. 6 of the Federal Employers' Liability Act (Sec. 56, Title 45, U. S. C. A.).

On November 27, 1942, the Circuit Court of Madison County sustained respondents' motion to dismiss and dismissed said suit, and entered judgment against petitioner

in bar of the action and for costs (H. R. 22). From that order and judgment petitioner (plaintiff) duly appealed to the Supreme Court of the State of Illinois (H. R. 23), where the judgment of the Circuit Court of Madison County, Illinois, was affirmed on September 24, 1943 (H. R. 25-33).

The opinion and decision of the Supreme Court of Illinois was based largely upon petitioner's (plaintiff's) failure to "commence" his suit in a court of competent jurisdiction within two years after sustaining his injuries, as required by Sec. 6 of the Federal Employers' Liability Act, which at the time of petitioner's injury required an action under it to be brought within two years. The Illinois Supreme Court, however, with equal emphasis, held that it was clear that no suit was commenced by the filing of the complaint in, or the issuance and service of summons by, the City Court, which had no jurisdiction of the action, that petitioner could have disregarded the alleged summons, that any judgment in such suit would be void and no execution could be issued by virtue of it. Sec. 6 of the Act was later amended so as to permit the action to be brought within three years after the injuries were sustained. It is not material here whether or not the amendment was retroactive because the motion for change of venue was filed July 17, 1942, and the record filed in the Circuit Court of Madison County on July 31, 1942, or about four and one-half years after the injuries were sustained. This is apparent from the following statement of the Court in its opinion (H. R. 27), namely:

> "The material point for consideration is whether the plaintiff has commenced an action within two years of the date of his injury in a court having jurisdiction to hear and determine the same, as required by Section 6 of the Federal Employers' Liability Act, by transferring the cause from a court having no jurisdiction over it at a date which, if then

originally filed in the latter court, could not be maintained because not filed within the statutory time." (H. R. 32) * * *

And again (H. R. 32):

"It is clear a suit was not commenced by filing the present suit in the City Court of Granite City, or by issuing summons or filing a complaint. **Lacking requisite jurisdiction because of the provisions of the Constitution limiting it to cases arising within the limits of the city, such Court was wholly incompetent to render any judgment or to authorize any proceedings which would result in a judgment.** When the case was transferred to the Circuit Court of Madison County, some five years after the date of the accident, by the filing of the transcript of orders entered in the City Court, and the pleadings and other documents, there was no commencement of a suit, but only the receipt of papers from a court in which it was impossible to commence one because of its lack of jurisdiction." (Emphasis supplied.)

In No. 25, the **Belcher case**, the material facts are very similar to those in the Herb case. In this case the accident on account of which the action was brought occurred February 15, 1939 (B. R. 2), in the switch yards in the City of Nashville, Tennessee. This suit was instituted in the City Court of East St. Louis, Illinois, on June 22, 1940 (B. R. 1), under the Federal Employers' Liability Act. Complaint was filed and summons was served on respondent in this case. On January 19, 1942 (B. R. 16), respondent filed a motion in the City Court to dismiss the cause for lack of jurisdiction of the subject matter, alleging, among other reasons, that Sec. 1 of Article VI of the Constitution of Illinois limits the jurisdiction of that court to suits arising within the city limits of East St. Louis, and setting forth that petitioner's suit did not arise within the limits of the City of East St. Louis but arose in the

City of Nashville, Tennessee. This motion was overruled by the City Court.

Afterwards respondent answered the complaint, the cause was tried in the City Court and a verdict in the case in favor of petitioner was set aside by the Court and a new trial granted.

On June 16, 1942, petitioner filed a motion in the City Court for a change of venue to the Circuit Court of St. Clair County, Illinois (B. R. 17), which motion was allowed by the City Court. The grounds of the petition for change of venue are substantially the same as those filed in the City Court of Granite City in the Herb case by the same counsel who represented petitioner in both cases. On July 17, 1942 (B. R. 20-21), the City Court of East St. Louis granted petitioner's motion for a change of venue to the Circuit Court of St. Clair County, and on August 10, 1942, the papers, proceedings and the transcript of the record in the City Court were filed in the Circuit Court of St. Clair County. Both the motion for change of venue and the allowance thereof and the filing of transcript in the Circuit Court were more than three years after the injuries were sustained; in fact, nearly three and one-half years thereafter. On August 15, 1942 (B. R. 21), respondent filed in the Circuit Court a motion to quash the summons issued by the City Court of East St. Louis and to dismiss the cause. The reasons assigned are the same as those assigned in the similar motion in the Herb case. On November 27, 1942 (B. R. 23), the Court sustained respondent's motion to dismiss and entered judgment in bar of petitioner's cause of action. Petitioner perfected an appeal from this order to the Supreme Court of Illinois, and that Court, on September 24, 1943, filed an opinion affirming the judgment of the Circuit Court. The opinion in this case is reported in 384 Ill. 281, and also appears in full in the record (B. R. 36-38), the Supreme Court of Illinois holding that the facts were parallel to those in

the Herb case and affirmed the judgment of the Circuit Court by virtue of the authority of the Herb case, decided on the same day, 384 Ill. 237. The two cases, therefore, present the same questions for consideration and decision by this Court. Petitioner in each of these cases filed his petition for certiorari on February 9, 1944, and the petitions were granted on March 27, 1944 (H. R. 45 and B. R. 42).

The Supreme Court of Illinois denied a rehearing in the Herb case on November 12, 1943 (H. R. 42), and in the Belcher case on the same day (B. R. 39). The petitions for rehearing are set forth in full in the two Transcripts of Record (H. R. 35 et seq. and B. R. 31 et seq.).

BASIS FOR THE DECISIONS BELOW.

Petitioners have devoted nearly four pages of their brief (pp. 9-12) to a statement of their conception of the basis for the decisions below, and state that there is some doubt as to the basis thereof. We submit that there is no doubt at all on this question. The decisions of the Supreme Court are clear in every respect and clearly hold that:

(1) Reaffirming its previous decisions the City Courts had no jurisdiction of the subject matter of these suits and could not constitutionally be given jurisdiction thereof.

(2) Inasmuch as the City Courts had no jurisdiction of the subject matter, no complaint was, in fact, ever legally filed; the summonses issued and services thereof were void and of no effect; all proceedings, whether preliminary or final, in the City Court were absolutely void; respondents could have disregarded the summonses served on them and let default be taken against them; any judgment rendered in such Court would be void, and no execution could be legally issued upon any such judgments and respondents' property could not be taken on any such execution.

(3) In view of the foregoing no suits were ever commenced in the City Courts nor could they be commenced therein, and consequently these suits were not commenced within two years after the injuries were received, as required by the Act.

(4) While, in substance, holding that Section 36 of the Venue Act did not apply, yet in the final analysis refused to pass directly upon the question of the validity, application or constitutionality of that section.

(5) It was unnecessary to pass upon the question of whether suits were commenced when the transcripts were filed in the Circuit Courts, because even if that constituted the "commencement" of suits, such fact was immaterial for the reasons that such filings were made more than two years after the injuries complained of were received. Yet the Court did pass upon this question and held that when the papers were filed in the Circuit Courts there was no commencement of suits there, but only receipt of papers from Courts in which it was impossible to commence them because of lack of jurisdiction.

Respondents contend, for the reasons hereinafter set forth in the argument, that:

(1) The Illinois Supreme Court was right in its conclusions as to Nos. 1, 2 and 3 above stated; that the decisions upon these points rest upon non-federal grounds which independently and adequately support the judgments; that the question of whether or when a suit is commenced in a State Court is a matter wholly within the jurisdiction of the State Court, its decision thereon in the absence of any federal constitutional question is final, and, therefore presents no federal question for review here, and consequently this Court has no jurisdiction of these cases.

(2) On No. 4, above stated, the Illinois Supreme Court did in the instant case and in other cases in fact decide

that Section 6 of the Venue Act did not apply to cases of this character brought in a City Court and would be unconstitutional if so applied. Yet for the purposes of these cases it declined directly to pass upon this question; furthermore, a decision on that question would be a non-federal question upon which the decision of the State Court would be final, would present no federal question and could not be decided here, but would be exclusively within the jurisdiction of the State Court to decide and determine.

(3) On No. 5, above stated, a decision upon that question is wholly immaterial, would not present a federal question and would not be reviewable by this Court. In fact, as stated in No. 5 above, the Illinois Supreme Court did directly pass on said point contrary to petitioners' contentions.

SUMMARY OF ARGUMENT.

I.

Jurisdiction of the various Illinois courts.

II.

City Courts under Sec. 2 of Article VI of the Illinois Constitution have no jurisdiction of any kind except in causes arising in the City where the Court is held.

III.

To give this Court jurisdiction in these cases, it must appear that there is a federal question involved which is decisive of the case. If the decision of the State court rests upon a non-federal ground, which independently and adequately supports the State court's judgment, this Court will not exercise jurisdiction.

IV.

No federal question is presented here. The decisions of the Supreme Court of Illinois rest upon non-federal grounds which independently and adequately support the judgments of the State court. The questions whether a suit has been commenced and whether brought in a State court, are obviously procedural questions, the decision of which by the State Supreme Court is final. Consequently, this Court has no jurisdiction of these cases.

V.

Even if the decision of the Supreme Court of Illinois on the question of whether or not a suit was commenced so as to toll the statute was not final, as we strenuously contend it was, yet that decision was right and is sustained by applicable and pertinent decisions and rules of law.

VI.

The City Courts did not have any jurisdiction, limited or otherwise, of these suits, did not have even a limited jurisdiction to change the venue to the Circuit Courts, and no such jurisdiction could constitutionally be conferred upon City Courts. Even if this question was debatable, the sole jurisdiction to decide it would rest in the Supreme Court of Illinois, and its decision would not present a federal question for review in this Court.

ARGUMENT.

I.

Jurisdiction of the Various Illinois Courts.

With the view that it might aid this Court in an understanding of the judicial structure in Illinois, we briefly refer to the Constitution, statutes and decisions relative thereto.

Sec. 1 of Article VI of the Illinois Constitution provides as follows:

> "The judicial powers, except as in this article is otherwise provided, shall be vested in one supreme court, **circuit courts**, county courts, justices of the peace, police magistrates, **and such courts as may be created by law in and for cities and incorporated towns**" (Ill. Rev. Stat., p. 25). (Emphasis supplied.)

The Supreme Court is the highest court of the State, and Sec. 2 of Article VI of the Constitution (Ill. Rev. Stat., p. 25) provides that it "shall have original jurisdiction in cases relating to the revenue, in mandamus and habeas corpus, and appellate jurisdiction in all other cases."

By statute, under constitutional authorization, an intermediate appellate court is provided for, having appellate jurisdiction only in certain cases. Likewise, county courts, probate courts, police magistrate and justice of the peace courts are provided for by the Constitution. Concededly, none of these courts has any jurisdiction whatever of tort actions. The only courts in Illinois having original jurisdiction of tort actions are the circuit courts, the Superior Court of Cook County (which is in fact an additional circuit court), and city courts **in tort actions arising within the limits of the city in which such city court is held.**

The only courts of general original jurisdiction in all cases at law and in equity and in statutory proceedings where such jurisdiction is conferred by the General Assembly are the circuit courts in the various counties. In fact, in the early cases of Beaubien v. Brinkerhoff, 3 Ill. 270, 2 Scam. 270; Hamilton v. Blair, 3 Ill. 276, 2 Scam. 276, and Beaubien v. Holmes, 3 Ill. 276, 2 Scam. 276, the Supreme Court of Illinois held that circuit courts are superior courts rather than inferior courts, possess original and unlimited jurisdiction at law and in equity, and exercise within their respective counties all of the powers and jurisdiction of the courts of King's Bench and common pleas in England.

In People v. Preston, 345 Ill. 11, 177 N. E. 761, the Supreme Court of Illinois held that circuit courts, having original jurisdiction of all causes in law and equity, are courts of general common law jurisdiction.

In People v. Graw, 363 Ill. 205, the Supreme Court of Illinois held that the provisions of Sec. 12 of Article VI of the Illinois Constitution that "circuit courts shall have original jurisdiction of all causes in law and equity" gives to the circuit court jurisdiction of all such causes, including every claim or demand known at the adoption of the Constitution, such as an action at law or a suit in chancery, and all actions since provided for involving personal or property rights of the same nature as those previously enforced by such actions or suits.

Therefore circuit courts, being courts of general jurisdiction, were open to both petitioners to bring their suits, provided, of course, that service upon defendants could be obtained.

On the other hand, city courts are courts of inferior jurisdiction. (The People v. Municipal Court, 359 Ill. 102, l. c. 107, 108, 109, and cases cited therein.) This case holds that the circuit court has the power to issue a writ

of prohibition directed to a city court and is the only court in the State possessing such power, and that that power does not exist even in the Supreme Court and the appellate courts.

City courts are established for the convenience of the people of the cities, and must be established by a vote of the people of the city in which they exist. Usually they exist in cities of considerable size which are not county seats, such as East St. Louis, Granite City, Chicago Heights, Calumet City, Aurora, Elgin, Moline, Canton and some twenty or thirty other cities in the State. By the decision in the Herb case (384 Ill. 237, l. c. 247) (H. R. 32), and other cases cited in division II of this argument, under the provisions of the Constitution above quoted, city courts cannot constitutionally be given jurisdiction of any case arising beyond the limits of the city in which they exist. The Illinois Supreme Court held that it is the Illinois Constitution itself which limits the jurisdiction of a city court to cases arising within the limits of the city.

Petitioners in their brief treat these decisions as merely holding that there is no venue in a City Court in a case arising outside the limits of the city. This is not true. The Court held that there was absolutely no jurisdiction in a City Court, and none could be constitutionally granted, of the subject matter of a suit arising outside the limits of the city in which such Court was held. The holdings were based solely on lack of jurisdiction of the subject matter of such a suit. However, in the "Conclusion" of their brief (p. 34) petitioners apparently abandon this contention and concede our contention in the following language:

> "Petitioners here recognize the invalidity of the trials had in their cases in the City Courts, in the light of the decisions in Werner v. Illinois Central R. Co., supra, and Mitchell v. Louisville & Nashville R. Co., supra, and recognize that all proceedings in the

said City Courts between the commencement of their suits and the changes of venue to the Circuit Courts, were void."

Petitioners then contend, in spite of such concessions, that the suits were legally commenced in the City Courts, even though those courts had no jurisdiction of the subject matter thereof, within the meaning of Sec. 6 of the Employers' Liability Act; further contend that even if this was not so the City Courts had a right to change the venue to the Circuit Courts, a question not directly passed upon by the Supreme Court of Illinois, and which, if material here, would be determined solely by the Illinois Court whose decision thereon would not present a federal question and would not be subject to review here; and that by reason thereof when the papers were filed in the Circuit Courts the date of commencement of the suits dated back to the attempted filing in the City Courts.

Under a subsequent heading in this argument we shall fully answer these contentions.

The Supreme Court of Illinois had never held, as contended in petitioners' brief (pp. 19-20) that City Courts possessed general jurisdiction of the subject matter of suits arising outside the limits of the city where located. An examination of the opinion in the Werner case, supra, clearly shows that the Illinois Supreme Court based its decision of lack of jurisdiction upon a long line of its former decisions, beginning with some of the earliest cases decided by that Court.

II.

City Courts Under Sec. 2 of Article VI of the Illinois Constitution Have No Jurisdiction of Any Kind Except in Causes Arising in the City Where the Court Is Held.

This proposition of law is no longer subject to dispute in Illinois. In Werner v. Illinois Central R. R. Co., 379 Ill. 559, the question of jurisdiction of the City Court in

a Federal Employers' Liability Act case was raised after the case reached the Supreme Court on leave to appeal. The Supreme Court of Illinois held that the vesting of judicial powers as provided by Sec. 1 of Article VI of the Illinois Constitution in "such courts as may be created by law in and for cities and incorporated towns" limited the jurisdiction of such City Courts to causes of action arising within the city in which such court was held, and that such City Courts had no jurisdiction, and in fact none could be granted to them under the Constitution, to try cases of any kind arising outside the corporate limits of such city. The Court said, l. c. 566:

> "As pointed out, the power of the Court to hear such a case is limited as to the place where the cause of action arose. If it arose without the city where the court is located, whether in the same county or another county or State, the city court is without jurisdiction to hear the case."

On the same day, on the authority of the Werner case, the Supreme Court of Illinois, in Mitchell v. L. & N. R. R. Co., 379 Ill. 522, upon a parallel factual situation, handed down an opinion to the same effect.

In Smith v. L. & N. R. R. Co., 381 Ill. 55, McGlynn & McGlynn, attorneys, sought to enforce an attorney's lien under the Illinois statute in the City Court of East St. Louis in a case that had been brought in that court though the cause of action arose outside the city. In the attorney's lien statute there is ample provision for enforcing the attorney's lien rights by petition in the client's cause. The Supreme Court held, however, under the authority of the Werner and Mitchell cases, that even the attorneys could not maintain their attorneys' lien in a case pending in a City Court which had no jurisdiction because the cause of action arose outside the city.

In the instant case of Herb v. Pitcairn, 384 Ill. 237 (H. R. 27), the Supreme Court of Illinois again followed the Werner, Mitchell and Smith cases, and held, l. c. 247 (H. R. 32), that lacking the requisite jurisdiction because of the provisions of the Constitution limiting it to causes arising within the limits of the city, the City Court was wholly incompetent to render any judgment or to authorize any proceedings that would result in a judgment.

In the Herb case, l. c. 244 (H. R. 30), the Supreme Court of Illinois said:

> "When the present suit was filed in the city court of Granite City the defendants could have disregarded the summons, and judgment rendered in such court would have been without effect and no justification for seizing defendants' property on execution."

No clearer statement could be made that the City Courts in each of these cases were wholly without jurisdiction to try these cases, and in fact had no jurisdiction whatever of the subject matter. If the defendants could have disregarded the summons and any judgment rendered in such courts would have been null and void and without effect, and would have been no justification for seizing defendants' property on execution, then it is idle to say that such a court has any jurisdiction whatever over the subject matter. To the same effect is the decision in the Belcher case, supra.

In fact, in the Werner, Mitchell and Smith cases, supra, the question of jurisdiction was raised for the first time in the Supreme Court, and after answer, trial and judgment, and that Court held that because jurisdiction was wholly lacking the question could be properly raised at that time.

In the Werner case, supra, 379 Ill., l. c. 566, the Supreme Court of Illinois, in passing upon this question and holding that, unlike venue, a question of jurisdiction was

involved which could not even be waived by appearance and participation in the trial and could be raised at any time, even on appeal, said:

> "The city court of East St. Louis being without jurisdiction of the subject matter, the judgment is void and of no effect. Jurisdiction could not be conferred by the consent of the parties and was not waived by defendant's appearance and participation in the trial. It is a question that may be raised at any time, even on appeal. Town of Audubon v. Hand, 223 Ill. 367; Town of Kingston v. Anderson, 300 id. 577."

Under well recognized and established principles of law these very facts conclusively demonstrate the total lack of jurisdiction of the City Court, and definitely and finally dispose of petitioners' points II, sub-pars. B, C and D of their Summary of Argument (pp. 16-17), and completely destroy the applicability of the arguments made and decisions cited in support thereof, as set forth on pages 28 to 31 of their brief. Furthermore, the decisions of the Illinois Court in the instant cases fully and completely refute this argument. Again this disposes of petitioners' argument in their brief (p. 28) to the effect that service of summons, filing of answer and entry of general appearance by respondents' recognized jurisdiction. The Illinois Supreme Court has held otherwise and its decision as we shall hereafter show is final upon that question and cannot be reviewed here.

It is not a question of limited jurisdiction, as intimated by petitioners' counsel in their petitions and brief. **It is a case of no jurisdiction at all of the subject matter.** Petitioners in their petitions have sought to imply that the City Court had a limited jurisdiction over the subject matter of these suits. That statement is made on page 7 of the petition in the Herb case, it is repeated on page 8 and at various other places in the argument and repeated

in their present brief, but is completely at variance with the cited decisions of the Illinois Supreme Court.

Again, on page 13 of the petition in the Herb case, and repeated and adopted in the Belcher petition (p. 11), and again reiterated under point IV on page 34 of their brief, it is implied that by these decisions the Supreme Court of Illinois has discriminated between rights arising under the Federal Employers' Liability Act and rights arising under State laws. This statement is not true. A reading of these decisions of the Supreme Court of Illinois will clearly show that its holdings as to want of jurisdiction apply to all kinds of cases—tort, contract, equity, divorce and every other kind of a proceeding known to law or equity. In fact, in the Werner case, 379 Ill. 559, l. c. 565, the Supreme Court of Illinois decided against petitioner's position when it said:

> "The question is not as to whether a city court has jurisdiction to try a personal injury case brought under the Federal Employers' Liability Act, but whether such a court has jurisdiction to try a case where the acts from which the cause of action arises occurred outside the territorial limits of the city."

Furthermore, the decision in Smith v. L. & N. R. R. Co., 381 Ill. 55, involved a suit to enforce an attorney's lien.

It seems unnecessary to argue this question further, not only on account of the authorities cited, but also on account of the fact that in the petitions for certiorari in these cases and in the motions for change of venue from the City Courts to the Circuit Courts and in their brief here petitioner in each case has admitted that the City Court did not have jurisdiction of the cases, except that it was, and is, claimed that the City Courts had a limited jurisdiction to change the venue, a question which we will hereafter discuss.

We therefore approach the real argument in this case with the clearly shown, and in fact conceded, principle

of law that the respective City Courts were wholly without jurisdiction to try these cases, limited or unlimited; and in fact had no jurisdiction whatever over the subject matter of these two cases.

III.

To Give This Court Jurisdiction in These Cases, It Must Appear That There Is a Federal Question Involved Which Is Decisive of the Case. If the Decision of the State Court Rests Upon a Non-federal Ground, Which Independently and Adequately Supports the State Court's Judgment, This Court Will Not Exercise Jurisdiction.

It seems scarcely necessary to cite authorities in support of the rule above laid down. On pages 3 and 13 of the brief in opposition to the petition in the Belcher case, and on pages 8 and 13 of the answer to the Herb petition, we have cited many authorities in support of this rule of law. We ask that they be considered in connection with this point. Here we cite but two late cases, namely, Honeyman v. Hanan, Executor, 300 U. S. 14, and Kalb v. Feuerstein, 308 U. S. 433.

In the Honeyman case, l. c. 18, this Court held that before it may undertake to review a decision of the court of a State, it must appear affirmatively from the record not only that the federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause. Again, on page 21 of the opinion this Court quoted approvingly from its previous decision in Brown v. Atwell, 92 U. S. 327, as follows:

> "We have often decided that it is not enough to give us jurisdiction over the judgments of the State courts for the record to show that a Federal question was argued or presented to that court for decision. It

> must appear that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it. Commercial National Bank of Cincinnati v. Buckingham's Executors, 5 How. 341; Lawler et al. v. Walker et al., 14 id. 154; R. R. Co. v. Rock, 4 Wall. 180; Parmelee v. Lawrence, 11 id. 38."

In the Kalb case, supra, l. c. 437, the Court said:

> "Appellees insist, however, that the Wisconsin court on rehearing rested its judgment on an adequate non-Federal ground. If that were the fact, we would not, under accepted practice, reach the State court's construction of the Federal statute."

It is our position, as we shall demonstrate under a subsequent heading, that there was not only no federal question presented for decision to or decided by the Supreme Court of Illinois, but also that the decision of the State court on which is claimed to be a federal question was not necessary to the determination of the cause, and that said decision was rendered without deciding any federal question; and, furthermore, that the decision of the Supreme Court of Illinois is based upon a non-federal ground which independently and adequately supports the State court judgment. If we are able to maintain this position, and we confidently expect to do so, then this Court has no jurisdiction of these cases and the writs of certiorari were improvidently granted.

IV.

No Federal Question Is Presented Here. The Decisions of the Supreme Court of Illinois Rest Upon Non-federal Grounds Which Independently and Adequately Support the Judgments of the State Court. The Questions Whether a Suit Has Been Commenced and Whether Brought in a State Court, Are Obviously Procedural Questions, the Decision of Which by the State Supreme Court Is Final. Consequently, This Court Has No Jurisdiction of These Cases.

These suits were brought under the Federal Employers' Liability Act. Sec. 6 of this Act as it existed at the time of the accidents in question provided as follows:

> "No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued.
>
> "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. **The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States, and no case arising under this chapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States.**" (Emphasis supplied.) U. S. C. A., Title 45, pp. 515, 516.

Since the accidents in question this section has been amended to substitute "three years" for "two years." As stated before, this is immaterial for the reason that (even if that fact was material) the alleged venue was changed more than three years after the causes of action accrued, so no question arises as to the retroactive effect of the amendment increasing the time within which actions can be brought under the Act.

Sec. 6 of the Act is not a statute of limitation pertaining to the remedy but is a condition of liability constituting a substantial part of the right created. Central of Vermont Ry. Co. v. White, 238 U. S. 507; Phillips v. Grand Trunk Ry. Co., 236 U. S. 662; Atlantic Coast Line Ry. Co. v. Burnette, 239 U. S. 199; Bell v. Wabash Ry. Co., 58 F. (2d) 569. Under these decisions, unlike in the case of a statute of limitation, nothing, not even infancy, mental disability or even fraud on the part of an employer, will extend the time for bringing the cause of action; nor, as held by the Circuit Court of Appeals in the Bell case, supra, will a State statute tolling a statute of limitations extend the time within which to bring an action under the Act.

Furthermore, Sec. 6 of the Act, after giving jurisdiction of cases under the Act to certain federal district courts, provides that "the jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States, and no case arising under this chapter and brought in any State court of **competent jurisdiction** shall be removed to any court of the United States."

It will be noted that jurisdiction is given by the statutes only to State courts of "competent jurisdiction," leaving to the States to determine which of its courts are courts of competent jurisdiction to try cases under the Act. The Act does not, and could not confer jurisdiction on any State Court. It simply says to the litigant that if he can find a State court having jurisdiction of a personal injury or death action, and can get service on the defendant, he may maintain his suit in that court.

In Mondou v. New York, N. H. & H. R. Co. (Second Employer Liability cases), 223 U. S. 1, 56-57, this Court said:

> "We deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of State Courts, or to control or

affect their modes of procedure, but only a question of the duty of such court, **when its ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion,** and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress, and susceptible of adjudication according to the prevailing rules of procedure." (Emphasis supplied.)

In fact, as said in the Mondou case, l. c. 56:

"This amendment, as appears by its language, instead of granting jurisdiction to the State courts, presupposes that they already possessed it."

This case conclusively answers petitioners' arguments as to the construction of this statute, as set forth on page 32 of their brief.

In Walton v. Pryor, 276 Ill. 563, l. c. 568-569, the Supreme Court of Illinois held that the federal Act gave an injured person no right to file suit under the Act in a State court unless that court had jurisdiction to hear and determine such suit. In other words, Congress cannot enlarge or regulate the jurisdiction of State courts or control or affect their modes of procedure. Each State may, subject to the restrictions of the Federal Constitution, determine the limits of the jurisdiction of its courts, the character of the controversies which shall be heard in them and specifically how far it will, having jurisdiction of the parties, entertain in its courts transitory actions where the cause of action has arisen outside its borders. All that Congress can do and has done by Sec. 6 of this Act is to say to a litigant having an alleged cause of action under the Act that if he can find a State court having jurisdiction of a tort action of the kind he has and can get jurisdiction of the person of the defendant, he may bring his suit in the State Court. Decisions in support of this rule of law are many. In all such cases, how-

ever, the State is the sole judge of the jurisdiction of its own courts, and its decisions, as expressed by its highest court, are final upon the question.

In Douglas v. New Haven R. Co., 279 U. S. 377, l. c. 387, this Court said:

> "As to the grant of jurisdiction in the Federal Employers' Liability Act, the Statute does not purport to require State Courts to entertain suits arising under it, but only to empower them to do so, so far as the authority of the United States is concerned. • • • But there is nothing in the Act of Congress that purports to force a duty upon such courts as against an otherwise valid excuse."

In St. Louis & Iron Mountain Railroad Company v. Taylor, 210 U. S. 281, plaintiff, as administratrix of the estate of George W. Taylor, brought suit in Arkansas under the Federal Employers' Liability Act against the railroad company to recover damages for the benefit of Taylor's widow and next of kin on account of his injury and consequent death, alleged to have been caused by the company's negligence. The accident and death happened in the Indian Territory and the plaintiff obtained a judgment which was affirmed by the Supreme Court of Arkansas. This Court decided that the question of jurisdiction of the State court was not a federal question and that this Court had no jurisdiction to review the decision of the State court holding that it had jurisdiction. In the opinion in that case this Court, on page 285, said:

> "The plaintiff in error contends that of such a cause, triable as it was in the courts of the territory created by Congress, the courts of Arkansas have no jurisdiction. **This contention does not present a federal question.** Each state may, subject to the restrictions of the Federal Constitution, determine the limits of the jurisdiction of its courts, the character of the controversies which shall be heard in them, and specifi-

cally, how far it will, having jurisdiction of the parties, entertain in its courts transitory actions where the cause of action has arisen outside its borders. Chambers v. Baltimore & O. R. Co., 207 U. S. 142, ante, 143, 28 Sup. Ct. Rep. 34. We have, therefore, no authority to review the decision of the state court, so far as it holds that there was jurisdiction to hear and determine this case. **On that question the decision of that court is final.**" (Emphasis supplied.)

In Chambers v. Baltimore and Ohio Railroad, 207 U. S. 142, 147, 52 L. Ed. 143, 146, this Court said:

"But, subject to the restrictions of the Federal Constitution, the state may determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them."

In John v. Paullin, 231 U. S. 583, 58 L. Ed. 381, at page 585, this Court said:

"Without any doubt, it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the State law and practice in this regard are no less applicable when federal rights are in controversy than when the case turns entirely upon questions of local or general law."

It cannot be said that the Illinois courts, by refusing to assume jurisdiction in the instant case, denied petitioner, as far as jurisdiction is concerned, any right or privilege to prosecute his suit in a State court pursuant to Section 6 of the Federal Employers' Liability Act (U. S. C. A., Title 45, Sec. 56), which provides that the jurisdiction of the courts of the United States under said chapter shall be concurrent with that of the courts of the several States, which when construed with the next sentence of the section means State courts of competent jurisdiction. This

Act does not confer any jurisdiction upon State courts or in any way enlarge their jurisdiction, as Congress is without authority to confer jurisdiction upon a State court or any other court which it has not ordained or established. This Court had occasion to construe this section of the Act in question in the Second Employers' Liability Cases, 223 U. S. 1, from which we have heretofore quoted in this argument.

In Walton v. Pryor, supra, 276 Ill. 563, the Supreme Court of Illinois in construing this section of the Federal Act held that whether a Circuit Court in Illinois had jurisdiction of an action for damages under the Federal Employers' Liability Act must be determined by the laws and Constitution of Illinois, as Congress cannot confer jurisdiction upon any court which it has not created, and that there was no restriction in the Federal Constitution upon the power of a State to determine the limits of the jurisdiction of its courts, except that the State must give to citizens of other States the same rights that it accords to its own citizens. In that case the Court, on page 569 of the opinion, said:

> "In view of the powers of the Federal Government and the States and in the light of the uniform decisions relating to the subject, this provision can only mean that when the jurisdiction of the courts of a State, **as fixed by local laws**, empowers them to hear and determine a certain class of actions, an action of that class arising under federal law may be enforced as of right in the state court." (Emphasis supplied.)

This doctrine has been consistently followed both by this Court and State courts. Among the numerous decisions upholding this rule, we call the Court's attention to Minneapolis & St. Louis R. R. Co. v. Bombolis, 241 U. S. 211, 222, 60 L. Ed. 961, 965, and Taylor v. Southern R. Co., 350 Ill. 139.

Whether or not a State court has jurisdiction of an alleged cause of action, although begun under the Federal Employers' Liability Act, does not present a federal question.

St. Louis, I. M. & S. Ry. Co. v. Taylor, 210 U. S. 281, 285;
Mondou v. N. Y. N. H. & H. R. Co., 223 U. S. 1, 58;
Chambers v. B. & O. R. Co., 207 U. S. 142, 148-149;
John v. Paullin, 231 U. S. 584;
Manning v. Ketcham, 58 Fed. (2d) 948, 949.

State courts derive their jurisdiction from the Constitution and laws of the States. The Federal Employers' Liability Act does not attempt to enlarge or regulate the jurisdiction of State courts, but only gives an injured person the right to file suit, under that Act, in a State court where such a court, **under the local law, has jurisdiction** to hear cases of that character, as Congress cannot confer jurisdiction upon any court which it has not created.

St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 285;
Chambers v. B. & O. R. Co., 207 U. S. 142, 148-149;
Mondou v. N. Y. N. H. & H. R. Co., 223 U. S, 1, 58;
Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211, 222;
Walton v. Pryor, 276 Ill. 563, 566-567;
Mo. River Tel. Co. v. First Natl. Bank, 74 Ill. 217, 115 N. E. 2;
Dougherty v. American McKenna Co., 255 Ill. 369, 99 N. E. 619;
Taylor v. Southern Ry. Co., 350 Ill. 139, 182 N. E. 805.

The State laws and practice relative to the jurisdiction of State courts, the mode, time and manner of invoking that jurisdiction and the rules of practice to be applied in

its exercise are no less applicable when federal rights are in controversy, than when the case turns entirely upon questions of local or general law.

> John v. Paullin, 231 U. S. 583;
> Goldenberg v. Murphy, 108 U. S. 162;
> Chesapeake & O. R. Co. v. DeAtley, 241 U. S. 310.

In the cited case of Goldenberg v. Murphy, Collector, 108 U. S. 162, Goldenberg brought a suit in the State court against Murphy, a United States Collector, to recover back federal duties paid under protest and alleged to have been illegally exacted. The applicable federal statute provided that suit must be "brought within 90 days after the decision of the Secretary." The time for commencing the suit expired on August 26. An effort was made to serve a summons without intervention of the sheriff. This could not be done, so summons from the State court was delivered to the sheriff on the day before the 90 days expired and served on the Collector one day after the expiration of the 90 day period. The New York statute provided that delivery of a summons to a sheriff with intention of securing service was the commencement of a suit. The entire controversy involved federal law but the suit was brought in the State court. In holding that the question of whether a suit was commenced was a question of State law, this Court said, l. c. 163:

> "A suit is brought when in law it is commenced, and we see no significance in the fact that in the legislation of Congress on the subject of limitations the word 'commenced' is sometimes used, and at other times the word 'brought.' In this connection the two words evidently mean the same thing, and are used interchangeably. As this suit was begun in a State court of New York, the laws of that State must determine when it was brought, and as that is prescribed by statute, we have no need of inquiry as to the practice in other States, or the rules of the common law."

We have heretofore quoted from John v. Paullin, 231 U. S. 583, l. c. 585, relative to the control of States of the procedure and practice of their own courts. In M. & St. L. R. R. Co. v. Bombolis, Admr., 241 U. S. 211, the question arose in a Federal Employers' Liability Act case as to whether a statute of Minnesota providing for a jury verdict concurred in by less than the entire panel was applicable to a case brought under the federal Act. This Court in sustaining the Minnesota statute as applying to a case under the Act, held that while a State court may enforce a right created by federal statute, such court does not while performing that duty derive its authority as a court from the United States but from the State; that consequently the Seventh Amendment to the federal Constitution did not apply and that a verdict in a Federal Employers' Liability Act case in a State court could constitutionally be rendered by the concurrence of less than the whole of the panel, even though the case if tried in the federal courts would require the concurrence of all of the members of the jury.

In C. & O. Ry. v. DeAtley, 241 U. S. 310, local rules of practice and procedure under the State practice were held to be applicable in Federal Employers' Liability Act cases, even though such rules and practices were contrary to those used in the federal courts.

In L. & N. R. R. Co. v. Holloway, Admr., 246 U. S. 524, this Court held in a Federal Employers' Liability Act case brought in a State court that whether a State court would obey a local rule of practice requiring the substitution of correct instructions for defectives ones requested was a question of State law and not reviewable by this Court.

It would seem from these cases that it is clearly established that the question of when a suit is commenced in a State court, even though it be to enforce a federal right, is a question of State practice upon which the decision of

the highest court of a State is final and no reviewable federal question is presented. In fact as we shall presently show, petitioners in their petitions concede this applicable rule of law.

The proper construction, interpretation and effect of a State statute being a question of local law and not federal law, the decision of a State court thereon is not subject to review by this Court.

> Knights of Pythias v. Meyer, 265 U. S. 30;
> Hotel & R. E. Int. v. Wisconsin E. R. Bd., 315 U. S. 437;
> Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 680;
> Morehead v. People ex rel. Tipaldo, 298 U. S. 587, 609;
> Senn v. Tile Layers' Union, 301 U. S. 468, 477;
> Moore v. I. C. R. R. Co., 312 U. S. 630, 634.

The United States Supreme Court, on writ of error, must accept, as final, the ruling of the State court of last resort on all matters of State law.

> Fox River Paper Co. v. R. R. Com., 274 U. S. 651, 655;
> Sauer v. N. Y., 206 U. S. 536;
> Kaukauna W. Power Co. v. Green Bay & M. Canal Co., 142 U. S. 254, 272, 277;
> Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 680.

Whether or not a State court has jurisdiction of a case is a question exclusively for the State court and its decision is not reviewable in the United States Supreme Court on certiorari.

> Smith v. Adsit et al., 16 Wall. 185.

In the petition in the Herb case (p. 11), and repeated in the petition in the Belcher case (p. 11), and repeated

verbatim in their present brief (pp. 15-16), petitioners, citing the above cases of Goldenberg v. Murphy, 108 U. S. 162; C. & O. R. Co. v. DeAtley, 241 U. S. 310, and M. & St. L. R. Co. v. Bombolis, 241 U. S. 211, and the Federal Employers' Liability Act, state that "The question of when a suit is commenced in a State court is a matter which the Federal courts recognize as being controlled generally by the practice in the particular State."

Again, in the argument in the Herb petition (H. R. 19) and repeated in the Belcher petition (p. 11), and repeated verbatim in their present brief (p. 27), petitioners state that in view of the well settled doctrines that in actions brought in a State court the Federal courts will follow the practice of the State in determining when an action is commenced (citing cases), and that the practice and procedure in actions brought under the Federal Employers' Liability Act in a State court will be governed by the law of the State in which such court is located (citing cases), there can be little room for doubt about the applicability of the Illinois doctrines in determining whether the cases were "commenced" within the time required by Sec. 6 of the Act. With these statements we agree. It is difficult to see, in view of these concessions, how petitioners can now contend that a federal question is here involved. In granting these petitions this Court must have overlooked the fact that petitioners had so conceded the law to be as we contend.

Again in the petition in the Herb case (p. 7), and repeated in the petition in the Belcher case, under "Questions Presented," petitioners say:

> "Only one basic question is raised in this Court on this record, viz.: Whether an action under the Federal Employers' Liability Act, instituted within two years from the day the cause of action accrued, in a State court which was without jurisdiction to hear and determine the merits of the action **but which had a**

limited jurisdiction to change the venue of such action to a court having complete jurisdiction thereof, the venue of which action was changed to such latter court more than two years after the cause of action accrued, is 'commenced within two years from the day the cause of action accrued' as required by Section 6 of the Federal Employers' Libility Act (Act of Apr. 22, 1908, c. 149, § 6, 35 Stat. 66, as amended by Act of Apr. 5, 1910, c. 143, § 1, 36 Stat. 291, U. S. C. 1934 Ed., Title 45, § 56).'

"Subsidiary to this main question, there is the question of whether Section 6 of the Federal Employers' Liability Act requires suits brought under that Act in State courts to be commenced in a State court which has full and complete jurisdiction over the action."

In their present brief, in the "Specification of Errors" (p. 13), petitioners in slightly different language present the same issues for decision here, laying particular stress upon their alleged right under the Venue Act to change the venue to the Circuit Courts and thus date the commencement of the suits back to the date when they were filed in the City Courts which had absolutely no jurisdiction of the subject matter thereof. In their present brief (p. 19) the basic and incidental questions, said to be involved, are stated in the same language as used in the "Questions Presented" in the petitions.

Therefore, though petitioners in both cases conceded that the City Courts did not have jurisdiction to hear and determine the actions, they contended that such courts had a limited jurisdiction to change the venue, that because the venue was changed and the papers were filed in the Circuit Courts after the period provided by statute, yet the commencement of the suits dates back to the time when they were filed in a court having no jurisdiction of them and were therefore commenced within two years from the day the cause of action accrued, and contended subsidiary to that that there is a question of whether Sec. 6 of the Act

requires suits brought under that Act in State courts to be commenced in a State court which has full and complete jurisdiction over the action. Petitioners therefore beg the question.

We have conclusively shown that the City Courts had no jurisdiction of any kind of the subject matter of these suits, that no limited jurisdiction existed and that all of these questions of jurisdiction were State questions which have been decided adversely to petitioners by the highest Illinois court and are not reviewable here.

In the Herb case (384 Ill. 237) the Court expressly stated in its opinion that it had been determined that City Courts in Illinois were without jurisdiction to hear and determine the subject matter of any action the cause of which arose outside of the territorial limits of the City Court in which the action was pending, and said:

> "The material point for consideration is whether the plaintiff has commenced an action within two years of the date of his injury in a court having jurisdiction to hear and determine the same. * * * The question involved relates to the effect of the proceedings had in a court wholly incompetent to render a valid judgment because, if the judgment to be rendered would be void, it necessarily follows the preliminary proceedings of the court necessary to rendition of judgment must likewise be void. If the court has no jurisdiction of the subject matter for judgment there can be no jurisdiction giving effect to process or pleadings. If judgment had been entered in the city court it would have been absolutely void" (H. R. 27).

And the Court in this opinion further said:

> "If the ultimate object to be obtained in a suit at law, namely, a judgment, is utterly void, it is difficult to understand how any of the preliminaries to such a judgment, such as summons, pleadings, interlocutory

orders and the like, have any effect when the result, had such proceedings been completed in the first court, would have been a nullity" (H. R. 29).

The Court in this case further held:

"It is clear a suit was not commenced by filing the present suit in the City Court of Granite City by issuing summons or filing a complaint. **Lacking requisite jurisdiction because of the provisions of the Constitution limiting it to cases arising within the limits of the city such Court was wholly incompetent to render any judgment or to authorize any proceedings which would result in a judgment.** When the case was transferred to the Circuit Court of Madison County some five years after the date of the accident by the filing of the transcript of orders entered in the City Court and the pleadings and other documents, **there was no commencement** of a suit, but only the receipt of papers from a court in which it was impossible to commence one because of its lack of jurisdiction. To hold the suit was started in the Circuit Court at the time when it was attempted to be commenced in the City Court is not only to decide something which is obviously not the fact, but also to give effect to the proceedings in another court which up to that time must be considered a nullity. To so hold would, in effect, revive a cause of action already barred by limitations and deprive the defendant of a vested right. Cooley's Constitutional Limitations, page 448" (H. R. 32). (Emphasis supplied.)

The Court in its opinion then added:

"This determination makes it unnecessary to pass upon either the constitutional question involved or the validity of the change of venue statute" (H. R. 33).

By reference and adoption these statements are equally applicable to the Belcher case (Petition p. 11).

In so holding the Supreme Court of Illinois was passing upon a question involving wholly and solely the jurisdic-

tion of its own courts and the practice and procedure therein. We have pointed out that whether a State court has jurisdiction of a case under the Federal Act does not present a federal question. The Congress cannot and has not attempted to enlarge or regulate the jurisdiction of State courts or practice and procedure therein. State laws and practice relative to the jurisdiction of State courts, the mode, time and manner of invoking that jurisdiction and the rules of practice to be applied in its exercise are no less applicable when federal rights are involved than when local rights are involved. The proper construction, interpretation and effect of a State statute and the rules of practice and procedure being questions of local law and not of federal law, the decision of a State court thereon is not subject to review by this Court, and the decisions of the Illinois Supreme Court rest upon a non-federal ground, viz.: what constitutes the commencement of a suit in a State court in Illinois and what is the jurisdiction of that Court. The decision of the Supreme Court of Illinois upon that question is upon a non-federal ground which independently and adequately supports the judgment of the State court.

It may be argued that because the suits were brought under a federal statute the time of the commencement thereof is a federal question and not a State question. Such cannot be and is not the case. The federal statute merely requires suit to be commenced within two years. **Whether that suit is commenced in a State court is wholly a question for the State courts to determine.** Without repetition, we call attention to the opinion of the Supreme Court of Illinois in the Herb case, because it adequately supports our position and clearly shows that that Court was passing upon a State question when a suit is commenced in a State court, which question it had the sole right to determine. Petitioners have conceded that the question of when a suit is commenced in a State court is

solely a question for the State court to determine. The commencement of a suit does not involve a federal question because a suit is not commenced until brought in a court of competent jurisdiction. No federal question is involved in any way. It was wholly a State question concerning the jurisdiction of State courts.

Petitioners could not contend that a suit was commenced if it had been started in the probate court, in the county court, before a justice of the peace, in the appellate court or in the Supreme Court. To commence a suit requires that it be brought in a court of competent jurisdiction to hear and determine the subject matter of the controversy. So far as commencing a suit within the legal meaning of the words, petitioner might just as well have written a letter to the Judge of a court, or have written the Chief Justice or one of the Justices of this Court, or started the suit in a justice of the peace court. Doing so in any one of these ways would have been just as effective to commence a suit within the legal meaning of the word as to file it in a court having no jurisdiction of the subject matter, even though that court issued summons and that summons was served.

Therefore, we submit that the Supreme Court of Illinois, in holding that no suits were commenced in the City Courts, was deciding and determining a non-federal question, and consequently this Court has no jurisdiction of these cases and the writs were improvidently issued. The Illinois Supreme Court did not even hold that the filing of the papers in the Circuit Court constituted the commencement of suits there. In fact, as we have pointed out, it held to the contrary (H. R. 32). All that it held was that no papers were filed in a court of competent jurisdiction until after the statutory period. The City Courts had, as we shall hereafter show, no jurisdiction to order the changes of venue. But, be that as it may, no suits were commenced in courts of competent jurisdic-

tion within the statutory period. The Illinois Supreme Court, the final arbiter, has so held. Even if the City Courts had jurisdiction to change the venue of the suits, which we deny, yet no suits were ever commenced or even any papers filed in a court of competent jurisdiction until long after the statutory period (see Herb opinion, l. c. 247, H. R. 33).

It might be argued that an injustice had been done petitioners by affirming these judgments of the Illinois Supreme Court. If this be so, petitioners have only themselves to blame. One of these accidents occurred at Decatur, Illinois; the other at Nashville, Tennessee. So far as the Herb case is concerned, it could have been brought, and service secured, in at least twenty-five circuit courts in Illinois having jurisdiction of it, and in any one of the District Courts of any one of the three Federal Districts in Illinois. In the Belcher case petitioner could have sued in any one of seven circuit courts in Illinois or in the Federal District Court for the Eastern District of Illinois. He could have sued at home—at Nashville, Tennessee. The Court will take notice, we think, that the L. & N. Railroad Company is a large railroad system, extending through many States, and that the Wabash Railway Company does likewise. These suits could in all probability have been brought in any one of seventy-five to one hundred jurisdictions. Petitioners sought to come far from home to bring their suits in city courts in Illinois. If they have lost any rights, they alone are to blame; and, in addition, that does not in any way change the legal aspects of the situation or the rules of law applicable to the factual situation.

We do not raise any question as to the legal right, even if not the moral right, of petitioners to go to other jurisdictions to bring their suits in courts of appropriate jurisdiction. Such legal right is confirmed by the decisions of this Court in B. & O. R. R. Co. v. Kepner, 314 U. S. 44,

and Miles v. I. C. R. R. Co., 315 U. S. 698. As Mr. Justice Jackson said in his concurring opinion in the Miles case, l. c. 706:

> "* * * the real issue is whether a plaintiff with a cause of action under the Federal Employers' Liability Act may go shopping for a judge or a jury believed to be more favorable than he would find in his home forum. An advantage which it is hoped will be reflected in a judgment is what makes plaintiffs leave home and incur burdens of expense and inconvenience that would be regarded as oppressive if forced upon them."

So, while plaintiffs may go shopping away from home in their efforts to seek a favorable forum, yet when they enter courts of doubtful or no jurisdiction, they do so at their own risk, and it might be said that, by analogy at least, the doctrine of caveat emptor would apply to them.

Jurisdiction in these cases must not be confused with venue. The Illinois decisions do not deny jurisdiction to City Courts in these cases because of improper venue. Jurisdiction is denied solely because of a total want of jurisdiction of the subject matter and because jurisdiction thereof cannot be constitutionally given to City Courts where the cause of action arises outside the limits of the city in which the City Court is held.

The decision of the Supreme Court of Illinois upon whether or not a suit was commenced is a State question and not a federal question; and the decision of the Supreme Court of Illinois on that question is final and cannot be reviewed here. The only two questions presented to the Supreme Court of Illinois were (1) that suits were "commenced" in the City Courts within two years, and (2) that the City Courts had a limited jurisdiction to change the venue (see Petition for Rehearing) (H. R. 31, B. R. 31). On the first issue the Illinois Supreme Court decided directly against petitioner. Under Point VI of

this argument we shall discuss the second issue. Throughout their entire brief petitioners seek to have this Court construe and apply the laws and decisions of the Illinois Supreme Court upon these questions, in spite of the fact that the Illinois Courts are final upon these questions and are not subject to review here, because no federal questions are involved.

V.

Even if the Decision of the Supreme Court of Illinois on the Question of Whether or Not a Suit Was Commenced So as to Toll the Statute Was Not Final, as We Strenuously Contend It Was, Yet That Decision Was Right and Is Sustained by Applicable and Pertinent Decisions and Rules of Law.

As conceded by petitioners and supported by the authorities heretofore set forth, when a suit is brought in a State court, even though it involves a suit under a federal statute, the laws of that State are controlling in determining the question whether a suit was actually commenced in the State court, as was the case in Goldenberg v. Murphy, Collector, 108 U. S. 162; yet, even if a federal question was involved, the decision of the Supreme Court of Illinois that no suit was commenced in these cases is supported by the overwhelming weight of authority. The opinion of the Supreme Court of Illinois in the Herb case, followed in the Belcher case, is a most convincing authority in support of that position.

In 14 Am. Jur., Sec. 167, p. 367, it is said that a universal principle, as old as the law, is that the proceedings of a court without jurisdiction are a nullity, and its judgment without effect, either on the person or property, and that a court without jurisdiction over the subject matter of a particular case can only dismiss the case for want of jurisdiction and possesses no other power or authority.

The city courts are courts of inferior and limited juris-

diction, and no presumption exists in favor of the jurisdiction of such courts as exists in the case of courts of general jurisdiction. 21 C. J. S. 153.

Where a court is without jurisdiction in a particular case, its acts and proceedings can be of no force or validity and are a mere nullity and void, not voidable. 21 C. J. S. 177. This Court so held in Vallely, Trustee, v. Northern Fire & Marine Ins. Co., 245 U. S. 348, l. c. 353, where it was said:

> "Courts are constituted by authority and they cannot go beyond the power delegated to them. If they go beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are not voidable but simply void, and this even prior to reversal."

Upon determining that it has no jurisdiction, a court not only may, but should, refuse to proceed further and determine other objections or issues or the rights of the parties; and a judgment of dismissal for want of jurisdiction or without prejudice should be entered, after which the court has no authority to proceed. 21 C. J. S. 179.

In Mail Co. v. Flanders, 12 Wall. 130, l. c. 135, this Court held that where the court is without jurisdiction it is in general irregular to make any order in the cause except to dismiss the suit. However, in this case this Court held that the rule does not apply to the action of the court in setting aside such orders as have been improperly made before the want of jurisdiction was discovered. This is the only exception to the rule, and, of course, the exception is based upon the preservation of orderly records and the expunging from the court records of void orders made by a court wholly without jurisdiction. The same exception is recognized in the rule laid down in 21 C. J. S. 179. To the same effect is Cleveland Ins. Co. v. Globe Ins. Co., 98 U. S. 366, l. c. 375.

There is a well considered case of Corbett v. Boston & Maine R. R. Co., 219 Mass. 351, and reported in 12 A. L. R. 683, to the effect that a court without jurisdiction cannot enter judgment in favor of either party but can only dismiss the case for want of jurisdiction. Other well considered Illinois cases, in addition to the instant case, to the same effect are The People v. Crowe, 387 Ill. 53-55; People ex rel. v. Shurtleff, 355 Ill. 210, l. c. 217; People ex rel. v. Thompson, 358 Ill. 81, l. c. 92, and People v. Superior Court, 234 Ill. 186. While all of these cases are habeas corpus cases, the principle applicable to those cases is equally applicable to all cases. Also see Gill v. Lynch, 367 Ill. 203; Welton v. Hamilton, 344 Ill. 82; O'Shea v. Farrelly, 302 Ill. 125, and Aurora v. Schoeberlein, 230 Ill. 496, to the effect that all acts and orders of a court having no jurisdiction of the subject matter are null and void and of no force and effect and can even be attacked collaterally.

In the Herb case the Supreme Court of Illinois said:

> "The fallacy of this argument rests in the fact that it becomes necessary to give validity to proceedings in the court, the judgment of which, if rendered upon such proceedings, would be wholly void. • • • It is difficult to understand how any of the preliminaries to such a judgment, such as summons, pleadings, interlocutory orders and the like, have any effect when the result, had such proceeding been concluded in the first court, would have been a nullity."

In Crowley v. Southern Railway Co., 139 Fed. 851, the Alabama Legislature had attempted to create a circuit court with different divisions, which act was held unconstitutional by the Supreme Court of Alabama. In that case the cause of action was claimed to have been saved because a summons had been issued out of such illegal division of the circuit court. The court held that the illegal division

of the circuit court being without jurisdiction, there was no authority for filing the summons and complaint in that court, that the summons and the service thereof were a nullity and that the attempt to institute and commence a suit in the illegal court was ineffectual to institute a suit in the real circuit court, the same as if plaintiff had filed the summons and complaint with some merchant.

In Inter-Southern Life Ins. Co. v. Pierce, 31 S. W. (2d) 692, it was held that a court having no jurisdiction could not make any valid order or decree in the case and had no power to transfer the case to another county. To the same effect is Willing v. Provident Trust Co., 21 Fed. Sup. 237, l. c. 238.

In Manning v. Ketchem, 58 Fed. (2d) 948, l. c. 949, the Court said:

> "When a judge acts in the clear absence of jurisdiction, i. e., of authority to act officially over the subject matter in hand, the proceeding is coram non judice. In such a case the judge has lost his judicial function. * * * In State ex rel. Egan v. Wolever, 127 Ind. 306, 26 N. E. 762, 763, the court said: 'The converse statement of it is also ancient. Where there is no jurisdiction at all there is no judge; the proceeding is as nothing.'"

Other cases to the effect that the filing of a complaint in a court having no jurisdiction over the subject matter, and the issuance of summons and the service thereof, does not constitute the commencement of a suit are: Vaught v. U. & S. R. R. Co., 132 Tenn. 679, 179 S. W. 314; Fairclough v. Southern Pac. Co., 157 N. Y. S. 862; Gulf, C. & F. S. Ry. Co. v. Gordon (Tex.), 218 S. W. 74; Fidelity Trust Co. v. Gill Car Co., 25 Fed. 737, and Schroeder v. Merchants and Mechanics Ins. Co., 104 Ill. 71.

As said by the Supreme Court of Illinois in the instant case, the filing of the complaint, the issuance of summons

thereon and the service of such summons, all in and out of a court having no jurisdiction of the subject matter, were wholly null and void, that no suit was pending by reason thereof, that the summons and service were a nullity and that respondents could have disregarded the summons, let default be taken against them, the judgment thereon could be void and respondents' property could not be reached by execution under such a judgment. While, of course, as we have shown, this was clearly a State question to be determined alone by the courts of Illinois, does not present a federal question and could not be reviewed here, yet if these judgments were reviewable here, they are supported not only by the Illinois decisions, but also by the overwhelming weight of authority everywhere, including well-considered cases in this Court.

VI.

The City Courts Did Not Have Any Jurisdiction, Limited or Otherwise, of These Suits; Did Not Have Even a Limited Jurisdiction to Change the Venue to the Circuit Courts, and No Such Jurisdiction Could Constitutionally Be Conferred Upon City Courts. Even if This Question Was Debatable, the Sole Jurisdiction to Decide It Would Rest in the Supreme Court of Illinois, and Its Decision Would Not Present a Federal Questions for Review in This Court.

The petitions for certiorari in these two cases are substantially the same; in fact, the "Questions Presented" and "Summary of Reasons for Allowance of Writ" are exactly the same in each of the petitions. In the petition in the Herb case, starting at page 11, appears a supporting brief, followed by an argument. In the Belcher petition (p. 11) it is stated that no supporting brief or argument is filed in that case because the case involves a parallel set of facts and identical questions of law as in

the Herb case, and consequently petitioner in the Belcher case adopts the supporting brief and argument filed in behalf of the Herb petition. In their present brief petitioners, conceding that the two cases present identical questions of law, present the same argument in both cases.

At various places in the petition, supporting brief and argument and in the present brief reference is made time and time again to the fact that the City Courts had limited jurisdiction over these cases. For example, in the "Questions Presented" in the Herb petition (p. 7) it is said that the City Courts had a limited jurisdiction to change the venue. This is repeated in the Specifications of Errors (p. 13). Again, under II (a) (Herb petition, p. 8) it is said that the City Courts had a limited jurisdiction over the action. Again, in the argument it is repeatedly stated that the City Courts had a limited jurisdiction over these suits, particularly for the purpose of ordering change of venue to the Circuit Courts. Extensive argument appears in the Herb petition (pp. 14 to 19) and in the present brief (pp. 19 to 27) from which plaintiffs' counsel infer that City Courts have a limited jurisdiction over every suit or proceeding, brought in a wrong City Court, to change the venue of such suit to a proper court; that a suit instituted in a court having no jurisdiction of the subject matter constitutes the commencement of an action by reason of that court having a limited jurisdiction to change the venue to a proper court, and that even though a suit is brought in a court having no jurisdiction of the subject matter, yet if that court has a limited jurisdiction to change the venue to a court having full jurisdiction, it is merely a continuation of the first suit, and the date of the commencement of the suit is the date of the filing of the same in the wrong court, and that when, on change of venue, the papers are filed in a proper court, the time of commencing the suit is carried back to the time when it was filed in the wrong court.

Again, on page 21 of the petition in the Herb case, it is said that "the City Court of Granite City was not wholly without jurisdiction of petitioner's action, although its jurisdiction over his action was a limited one—limited to the granting of a change of venue to a court having full jurisdiction."

This statement is repeated in the present brief (p. 30). In fact, in the present brief, eight pages of the argument out of a total of fifteen pages are devoted to a discussion of the validity, application and constitutionality of Sec. 36 of the Venue Act and to the alleged failure of the Illinois Supreme Court to hold such statute valid, applicable and constitutional.

Petitioners have therefore rested their whole case upon their claim that the City Courts had a limited jurisdiction to change the venue under and by virtue of the provisions of Sec. 36 of the Illinois Venue Act, Ill. Rev. Stat., Chap. 146, p. 3226, the material part of which is as follows:

> "That wherever any suit or proceeding shall hereafter be commenced, in any court of record in this State, and it shall appear to the court where the same is pending, that the same has been commenced in the wrong court or county, then, upon motion of either or any of the parties to such suit or proceeding, the court shall change the venue of such suit or proceeding to the proper court or county, and the same, when the venue shall be so changed, shall be then pending and triable in such court or county to which the same shall be so changed the same as in other cases of change of venue."

As we have pointed out, the Supreme Court of Illinois has consistently held that no jurisdiction of any kind could constitutionally be granted to a City Court in a suit arising outside of the limits of the city in which such City Court is held. The Supreme Court of Illinois has gone so far, as we have pointed out, to hold that a summons issued

in such a case was void; that the defendant even though served with summons could disregard the service, let default be taken against him and the judgment would be void and no execution could be issued thereon. The Court could not have used stronger language to show the complete and utter lack of jurisdiction of City Courts over causes arising outside the city limits.

An examination of the petitions for rehearing in the Supreme Court of Illinois (H. R. 35 and B. R. 31) clearly demonstrates that petitioners' complaint about the decisions of the Supreme Court of Illinois was that that Court had not held in its opinions that the City Courts had a limited jurisdiction to change the venue.

The motions for change of venue appear in the printed record (H. R. 17 and B. R. 17). In these motions, petitioners, conceding that their suits had been brought in courts without jurisdiction, invoked this venue statute for the purpose of removing the causes to the Circuit Courts of the alleged proper counties. By the motions to dismiss (H. R. 18 and B. R. 21) respondents directly raised the questions that this statute was not applicable to City Courts or other courts of special jurisdiction, having no jurisdiction of the subject matter, and that if it was so construed to confer power on City Courts in cases of this character to change the venue to a Circuit Court, the statute, if so construed and applied, would be unconstitutional and in violation of Sec. 1 of Article VI of the Illinois Constitution, for the reason that the General Assembly could not constitutionally confer power or jurisdiction upon a City Court to grant such a change of venue in a case over which it had no jurisdiction whatever.

In support of his position, petitioner cited the cases of Central Illinois Public Service Co. v. Industrial Com., 293 Ill. 62; Gill v. Lynch, 367 Ill. 203, and Herb v. Pitcairn, 384 Ill. 237, l. c. 245. The Supreme Court of Illinois, in construing its holding in the Central Illinois Public Service

Co. case, said that it there held that the Venue Statute in Illinois as applying to a Circuit Court having no jurisdiction over the subject matter has no other purpose than to authorize a transfer to another Circuit Court which does have jurisdiction, and stated that that decision was so interpreted in the Gill case. After discussing these two cases, the Supreme Court of Illinois said in the Herb case, l. c. 246 (H. R. 32), that the distinction to be drawn is that if a case is improperly filed in a court having jurisdiction of the cause generally but without its territorial jurisdiction, it may be transferred to the proper Circuit Court. The Court then distinguished between the filing of a case in a court having general jurisdiction and a court having no jurisdiction, and stated that the interpretation of the Venue Statute in the Gill case is conclusively against petitioner.

However, after practically holding that the Venue Statute did not apply to a case of this character in City Courts and would be unconstitutional if it was so held to apply, the Supreme Court of Illinois did not pass directly upon these questions, but contented itself with holding that under the State law no suit was ever commenced within the legal meaning of that word, and said in the Herb case, l. c. 244 (H. R. 40): "Conceding, but not deciding, that in proper cases a court without jurisdiction of the subject matter could by statute be authorized to transfer its proceedings to a court having jurisdiction, still the condition that the action be commenced within two years is not met."

In substance, therefore, in the Herb case the Supreme Court of Illinois held that jurisdiction could not be conferred upon the City Court to change the venue in a case over which it had no jurisdiction of the subject matter. After substantially holding this, however, the Supreme Court proceeded to state that it was not deciding the case on that question but was deciding it upon the fact that no

suit could be or ever was legally commenced in either of the City Courts in question.

The Supreme Court of Illinois had in the Industrial Commission case, supra, 293 Ill. 62, and the Lynch case, supra, 367 Ill. 203, held that even though the Legislature did not confer jurisdiction of the subject matter of a statutory proceeding on a Circuit Court, yet a Circuit Court being a court of general jurisdiction, it could confer upon a Circuit Court the special jurisdiction to change the venue of the cause to a proper court.

Petitioners in their brief (p. 26) quote correctly from the decision of the Illinois Court in the Herb case (384 Ill., l. c. 246), although expressing doubt as to the meaning of the language used, but deducing therefrom that it is manifest that the part of the opinion quoted establishes that the Illinois Court apparently held that the City Courts had a limited jurisdiction to change the venue of the suits to the Circuit Courts. The quoted part of the opinion sustains our position. The City Courts did not have jurisdiction **generally** of the instant cases. The Illinois Court did not hold that City Courts had general jurisdiction of a cause because of any question of territorial jurisdiction. It held that City Courts did not have, and cannot constitutionally be given, jurisdiction of any cause arising outside the limits of the city where the court is located, and that the only jurisdiction conferred or that could constitutionally be conferred was jurisdiction of the subject matter in cases arising within the city where the court was held. Counsel in their argument continuously confuse jurisdiction and venue. A court may have jurisdiction generally of the subject matter but in that court there may not be proper venue for the suit. In fact, in the Werner case, supra, the Illinois Supreme Court held as follows:

> "The appellee contends that since his action is transitory and not local the city court had jurisdic-

> tion over the case. The issue raised is not one of venue but a question as to power and authority of a court to hear a particular case."

But here there was not and could not be jurisdiction of the subject matter because of total lack of jurisdiction of the subject matter and not on account of any question of venue. The City Courts had no jurisdiction, limited or unlimited, and no jurisdiction general or otherwise of the subject matter of the suits. The Illinois Supreme Court has so held in clear, unmistakable and understandable language.

In the Werner case, supra, 379 Ill. 559, l. c. 566, the Supreme Court of Illinois, in referring to another section of the Venue Act and answering an argument that had been made, said:

> "Reference is made to section 14 of the City Court Act (Ill. Rev. Stat. 1941, chap. 37, par. 346), which provides for change of venue from one city court to another, to a circuit court 'or to any other court of competent jurisdiction.' Action authorized by this section is on the assumption that the city court from which the change of venue is sought had jurisdiction to hear the case. It is not an attempt to prescribe jurisdiction, that being covered by section 1, previously considered."

The Court thereby held that in order to justify a change of venue under Sec. 14 (and the same rule applies to Sec. 26 of the Venue Act), change of venue could only be sustained upon the assumption that the City Court from which the change of venue was sought had jurisdiction to hear the case.

As stated before, Circuit Courts of Illinois are courts of general jurisdiction, with unlimited jurisdiction in all law and equity cases, and with such statutory jurisdiction as may be conferred upon them. Even though a Circuit Court had no jurisdiction over the subject matter of a

statutory suit filed in that court, yet the General Assembly might constitutionally confer upon the Circuit Court, being a court of general jurisdiction, the special jurisdiction to change the venue to a proper court or county. However, the Supreme Court of Illinois has held that no jurisdiction of any kind can constitutionally be conferred upon a City Court by the General Assembly, except where the cause of action arises in the city where such court is held. Consequently, our position before the Supreme Court of Illinois was and is now, that constitutionally the General Assembly could not confer upon City Courts the special jurisdiction to change the venue of causes over which they had no jurisdiction.

It should be noted that in the Gill and Industrial Commission cases, discussed by the Illinois Supreme Court, the cases involved statutory proceedings and not suits at law or in equity, and therefore the General Assembly could give or not give jurisdiction thereover to Circuit Courts.

Furthermore, the Supreme Court of Illinois said in the Herb case, l. c. 247 (H. R. 33):

> "In this case jurisdiction of the suit was wholly lacking until July 31, 1942 (if we consider the change of venue act valid), and at this time the condition imposed upon the plaintiff with respect to bringing his suit had expired by lapse of time. This determination makes it unnecessary to pass upon either the constitutional question involved or the validity of the change of venue statute."

If it can be said that the Supreme Court of Illinois has not passed upon this question, either in the Herb opinion or the other opinions, yet the final determination of this question is one for the Supreme Court of Illinois and not a question to be determined by this Court. If this was the material turning point in this case, the Supreme Court of Illinois would be the final arbiter to pass upon that question. See Huddleston v. Dwyer, decided May 15, 1944, and reported in 64 Sup. Ct. Rep. 1015, ... U. S. .....

However, it is not material here to determine whether the Supreme Court of Illinois has passed upon this question, or whether it should pass upon it. The Supreme Court of Illinois has decided these cases upon adequate non-federal grounds which are not reviewable here. Even if they were reviewable here, the cases have been properly decided by the Supreme Court of Illinois.

CONCLUSION.

We submit that no federal question is here presented for determination; that the Supreme Court of Illinois decided these case wholly upon non-federal questions, concerning which the decision of that Court is final, and that even if this were not true, its decision is supported by the overwhelming weight of authority as to the questions decided. The Court did not directly pass upon the questions raised as to the constitutionality of the Venue Act under the State Constitution, although by prior decisions and in the instant cases it substantially decided against petitioners' contentions in that respect.

It seems to us that the writs in these cases were improvidently granted. We therefore ask that the judgments of the Supreme Court of Illinois be affirmed, or that the orders granting the writs be set aside and the petitions for the writs denied.

All of which is respectfully submitted.

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SUPREME COURT OF THE UNITED STATES.

Nos. 24 and 25. — OCTOBER TERM, 1944.

VICTOR J. HERB,
Petitioner,
24 vs.
NORMAN B. PITCAIRN and FRANK C. NICODEMUS, JR., Receivers for WABASH RAILWAY COMPANY,
Respondents.

BENJAMIN F. BELCHER,
Petitioner,
25 vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Respondent.

On Writs of Certiorari to the Supreme Court of the State of Illinois.

RESPONDENTS' PETITION FOR REHEARING.

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SUPREME COURT OF THE UNITED STATES.

Nos. 24 and 25. — OCTOBER TERM, 1944.

VICTOR J. HERB, Petitioner, vs. NORMAN B. PITCAIRN and FRANK C. NICODEMUS, JR., Receivers for WABASH RAILWAY COMPANY, Respondents.	On Writs of Certiorari to the Supreme Court of the State of Illinois.
BENJAMIN F. BELCHER, Petitioner, vs. LOUISVILLE & NASHVILLE RAILROAD COMPANY, Respondent.	

RESPONDENTS' PETITION FOR REHEARING.

Now come Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers for Wabash Railway Company, respondents in cause No. 24, above described, by J. A. McClain, Jr., J. H. Miller, George D. Burroughs and Bruce A. Campbell, their attorneys; and Louisville & Nashville Railroad Company, respondent in cause No. 25, above described, by Harold Baltz, Walton Whitwell and Bruce A. Campbell, its attorneys, and respectfully move this honorable Court, as provided by Rule 33 of this Court, to enter an order

granting to these respondents a rehearing in said consolidated causes, in which the final opinion of this Court was rendered on April 23, 1945.

And in support of this motion respondents most respectfully urge and state that this Court in its said opinion has overlooked and misapprehended points of law material and pertinent to a proper decision in these consolidated cases, in the manner and respects hereinafter more specifically set forth.

I.

The Court has overlooked or misapprehended rules of law, material and pertinent to a proper decision of these consolidated cases.

A. In its opinion, this Court, in commenting upon the announcement of the Illinois Court, in response to petitioners' request for a clarification of the grounds upon which it intended to rest its judgment, said:

> "That court, responding to petitioners' request, has made clear that its judgment resulted solely from its interpretation of a federal statute of limitations applicable to actions under the Federal Employers' Liability Act which provided: 'No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued.'"

It is respectfully submitted that in its holdings the Illinois Court did not pass upon a federal question decisive of the case but that the decision of the Illinois Court rests upon a non federal ground which independently and adequately supports the state court's judgment, and that consequently this Court has no jurisdiction of these causes. In fact the Illinois Court stated, that, under Illinois practice, while the trial courts' certificates that federal que-

tions and state constitutional questions were involved, gave it jurisdiction of the cases upon direct appeal, yet it had not passed upon these questions.

The Illinois Court further said in its announcement that it passed upon the question of whether or not suits were commenced in the state courts solely as a state question, and that after holding that under state practice no suits were ever commenced in the city courts it merely applied the two years statute prescribed by the Act. The only federal question that could possibly be involved was the two years statute, and that was not a law question, but was merely a matter of mathematical computation of time.

Even though the word "commenced" is used in Sec. 6 of the Act, yet that does not permit this Court to determine as a federal question when or whether a suit was commenced in a state court. That is wholly a matter of state law. When petitioners, as plaintiffs, chose their forums in the state courts, they were bound by the state rules of practice, procedure and jurisdiction applicable to those courts by state law, and neither this Court nor the Congress has the power or authority to regulate in the state courts any of these matters.

In our original brief, pages 23 to 41, and in our oral argument before this Court, we thought we had covered this question fully and completely; and we again ask this Court to consider the rules laid down by the decisions then cited, most of which are cited in the opinion of this Court of February 5, 1945, under the point labeled "First" in that opinion. We particularly call attention to the quotation in the opinion of February 5, 1945, from the Mondou case, 223 U. S. 1, l. c. 56-57, which this Court quoted approvingly to the effect that under the Act **Congress did not attempt to enlarge or regulate the jurisdiction of state courts, or to control or affect their modes of procedure,** but only made it the duty of a state court to take juris-

diction **when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws, and when the action is susceptible of adjudication according to the prevailing rules of procedure.** (Emphasis supplied.)

Further, we call attention to the quotation in the opinion of February 5, 1945, from the Douglas case, 279 U. S. 377, l. c. 387-388.

Furthermore, the case of Goldenburg v. Murphy, 108 U. S. 162, is exactly in point on this question. It is cited and commented upon on page 30 of our original brief. This Court, in neither of its opinions, has commented on this case or the other cited cases, and although the last opinion impliedly overruled it, it is not mentioned, distinguished or expressly overruled in the opinion. The present opinion of this Court is in direct conflict with its decision in the Goldenburg case, to the effect that even though one is suing on a federal right of action in a state court and under a limitation prescribed by federal statute as to when suit shall be commenced or brought, yet the state court, as a matter of state law, is the sole judge of when the suit was commenced or brought and its decision on that question presents wholly and entirely a state question and not a federal one.

It is interesting to note that in a recent decision of the Circuit Court of Appeals of the 10th Circuit, in the case of Isaacks v. Jeffers, 144 F. (2d) 26, l. c. 28, that Court so construed the Goldenburg case, and this Court denied certiorari on December 4, 1944, 65 S. Ct. 270.

When petitioners selected the state courts as forums for their controversies, they accepted the rules of state practice relative to when or whether a suit was commenced. The question of when a suit is commenced in a state court cannot be a federal question merely because the word "commenced" is used in a federal statute. If

Illinois Court has held that no suits were ever pending in the city courts under state practice. The state court is the sole arbiter of that question, and its determination is not a federal question, does not involve the construction of a federal statute and is merely a matter of practice and procedure in the state courts which those courts alone control.

We again call the Court's attention to the cases of John v. Paullin, 231 U. S. 383; C. & O. Ry. v. DeAtley, 241 U. S. 310, and L. & N. R. R. Co. v. Holloway, Admr., 246 U. S. 524, cited and discussed on page 31 of our original brief on this point, and also the decisions cited but not discussed to the same effect appearing on page 32 of our original brief.

B. To declare or enforce any other rule on the part of this Court would be judicial legislation on its part and the establishment of a rule in Federal Employers' Liability cases which would not apply to other cases in the state courts, and would be an interference with the right of the State to prescribe its own rules of practice and procedure, free from interference by federal legislation and decisions where such practice and procedure was not in contravention of any provision of the Constitution of the United States. In other words, if the decision in the instant case stands, there will be one rule in Illinois in Federal Employers' Liability cases and another rule in all other cases relative to when a suit is commenced or whether or not commenced at all in a court having absolutely no jurisdiction of the subject matter. For example, a railroad employe engaged and injured in interstate commerce might file papers in a court having no jurisdiction, or possibly with the Board of Supervisors, and he would have commenced a suit; but a person injured in a crossing accident and suing a railroad to recover damages would not

have commenced a suit by filing it in a court having no jurisdiction of the subject matter. Such a rule, we submit, would produce confusion, prescribe different rules of practice and procedure in state courts in cases of similar character, would deny to a state the right to determine such matters for itself, and would not be within the power, jurisdiction and authority of this Court to so require. In fact the General Assembly of Illinois could not make such a distinction because Sec. 22 of Art. IV of the Illinois Constitution (Ill. Rev. Stat., p. 22) prohibits it from passing any local or special law "regulating the practice in courts of justice." This decision therefore legislates on a matter of Illinois practice in a way that even its own General Assembly could not do.

C. In the opinion of April 23, 1945, this Court said:

> "An action is 'commenced' for these purposes as a matter of federal law when instituted by service of process issued out of a state court, even if one which itself is unable to proceed to judgment, if the state law or practice directs or permits the transfer through change of venue or otherwise to a court which does have jurisdiction to hear, try, and otherwise determine that cause."

In its announcement the Illinois Court states that it had held that the trial courts could have had no jurisdiction under any circumstances until the purported transfer to the circuit courts, and that even then the orders of the circuit courts, if otherwise valid, did not and would not have the effect of causing the time of commencement to relate back to the date of filing the cause in the city courts. Even this statement was made with the assumption, but without deciding, that the venue statute was applicable and constitutional. This is wholly a state question. Each respondent filed a special appearance in the circuit courts;

they have never generally appeared in such courts. Concededly, the statute had expired when the papers were filed in the circuit courts.

While the Illinois Court declined to pass upon the applicability or constitutionality of the venue statute, yet it did hold conclusively that even if that statute was applicable and constitutional, yet under state practice there would be no suit commenced until the papers were filed in the circuit courts and that the time of commencement would not relate back to the filing of the papers in the city courts. The Illinois Court further held in its original opinions that the summonses were void, that the service was void, that respondents could have disregarded the summonses and service and let default go against them, that any judgments rendered thereon would be void, that no executions could be issued thereon and that even a general appearance and participation in trials and appeals did not make any cases pending in the city courts. In other words, on the question of jurisdiction of the city courts, which this Court concedes is a state question, so far as commencing a suit is concerned, these cases might just as well have been filed with the Board of Supervisors of the county or a City Council of some city in the State of Illinois. This is true because under Illinois law these cases were filed in courts that were not even courts, so far as these cases were concerned, because they had no jurisdiction of the subject matter of the suits. This Court, in its opinions, has not passed upon this question but has overlooked that part of the Illinois Court's opinions relating to this phase of the case.

D. The opinion in this case clearly changes the rule of law that has been established by this Court and adhered to for more than a century. It overlooks, without directly overruling, its own cases to the contrary; and it establishes

the precedent, heretofore unheard of in judicial annals, that this Court may prescribe, merely because a federal statute is involved, matters of practice and procedure in the state courts. Such a decision is contrary to previous conception of the nature and separation of powers between the federal government and the states, and is an exercise of federal authority on matters which have always been and always should be, in the absence of constitutional inhibitions, left exclusively to the control of the states themselves.

The whole basis of this Court's opinion is that because the Federal Act used the word "commenced" this Court has the full right and authority to define that word when an action is attempted to be commenced in a state court, even though that construction is entirely different from the state court's construction applicable to all other cases. This Court further predicates its opinion upon the hypothesis that this is a decision upon a federal question. If this construction is correct, then whenever a federal statute of any kind is the basis of a state court action this Court may by review regulate all matters of practice and procedure in the state court in such a case. Such a practice, in our opinion, is not, and cannot be the law, and yet this opinion lays the foundation for entire assumption by this Court of such matters in state courts when any federal question is involved, whether or not such federal question is decisive of the case. It overrules all existing precedents and establishes a dangerous precedent for the future.

II.

Conclusion.

Rule 33 of this Court prevents us from further amplifying our views on the questions involved in this petition. With all due respect to the Court, and in the most respectful manner, we urge this motion. We ask that our petition

for rehearing be granted, that the causes be again heard and considered by this Court, and upon such further hearing and reconsideration that the judgments of the Illinois Supreme Court may be affirmed.

All of which is respectfully submitted.

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in No. 24.

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Certificate of Counsel.*

We, the undersigned, counsel for the respective respondents in the above consolidated causes, do hereby certify that Respondents' Petition for Rehearing filed herewith is filed and presented in good faith and not for delay.

J. A. McClain, Jr.,
J. H. Miller,
Geo. D. Burroughs,
Bruce A. Campbell,
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*The above and foregoing is a true, correct and exact copy (exclusive of caption) of a duly executed original certificate of counsel filed with the foregoing Petition for Rehearing.

SUPREME COURT OF THE UNITED STATES.

Nos. 24 and 25.—October Term, 1944.

Victor J. Herb, Petitioner,
24 *vs.*
Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers for Wabash Railway Company.

Benjamin F. Belcher, Petitioner,
25 *vs.*
Louisville & Nashville Railroad Company.

On Writs of Certiorari to the Supreme Court of the State of Illinois.

[February 5, 1945.]

Mr. Justice Jackson delivered the opinion of the Court.

Each of these petitioners has made an abortive attempt to maintain an action in a City Court of Illinois on a cause of action alleged under the Federal Employers' Liability Act. As their calls upon us for relief present the same questions, in granting certiorari we consolidated the cases for argument. 321 U. S. 759.

Herb alleged injury while employed as a switchman on the Wabash Railroad at or near the City of Decatur, Mason County, Illinois, on November 23, 1936. He filed complaint under the Federal Act in the City Court of Granite City, Madison County, Illinois, in December of 1937. A verdict of $30,000 was returned, which the trial court set aside. Further proceedings in the Appellate Court and the Supreme Court resulted in remand to the City Court. 377 Ill. 405. On March 16, 1942, in other cases, the Supreme Court of Illinois decided that, under the Illinois Constitution, a city court is without jurisdiction in any case where the cause of action arose outside the city where the court is located. *Werner* v. *Illinois Central R. Co.*, 379 Ill. 559; *Mitchell* v. *L. & N. R. Co.*, 379 Ill. 522. When these decisions were rendered, plaintiff moved in the City Court for a change of venue, under the Illinois Venue Statute, to the Circuit Court of Madison County, a court of general jurisdiction. Meanwhile the two-year period within which an action could be instituted under the Employers'

Liability Act had long expired. The motion for change of venue was granted and the papers certified and transferred accordingly. The defendant, limiting appearance for the sole and only purpose of the motion, moved, in the Circuit Court, to dismiss on the grounds that the City Court had no jurisdiction either to entertain or to transfer the case; that, since all proceedings theretofore were utterly void, no action was pending or properly commenced by the City Court process, nor by the transfer; that, since no action had been commenced in a court of competent jurisdiction, any right under the Federal Act had expired by its limitation, which provided that "No action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued." 35 Stat. 66, 45 U. S. C. §56.[1] The Circuit Court granted the motion to dismiss and the Supreme Court of Illinois affirmed. Its affirmance is here claimed to involve a federal question, erroneously decided.

Belcher alleged that he was a switchman on the Louisville & Nashville Railroad in its yards at Nashville, Tennessee, where he was injured on February 15, 1939. He filed his complaint on June 22, 1940, in the City Court of East St. Louis, Illinois. The answer joined issue generally and pleaded a release and satisfaction. Reply admitted execution in Nashville, Tennessee, of the document which defendant pleaded, but set up facts in avoidance. On trial a verdict of $20,000 was returned. The trial court set it aside, holding that the evidence did not warrant the verdict. This was on September 18, 1941, and at this stage of the litigation the Supreme Court of Illinois handed down its decisions of March 16, 1942 holding city courts without jurisdiction of causes arising outside their territorial jurisdiction. The plaintiff moved in City Court that venue be changed to Circuit Court of St. Clair County, Illinois, and the motion was granted. The statute of limitations on the commencement of the action at this time had run. Defendant made appearance limited to the purpose of moving to dismiss. The case was dismissed by the Circuit Court, and the dismissal was sustained by the Supreme Court of Illinois, in an opinion which adopted the opinion in the companion case.

[1] An amendment adopted after the present causes of action accrued extended the limitation period to three years, 53 Stat. 1404, but no question of its applicability is raised and, in any event, in each case the transfer to the circuit court was made more than three years after the cause of action accrued.

First. Whether any case is pending in the Illinois courts is a question to be determined by Illinois law, as interpreted by the Illinois Supreme Court. For as we have said of the Federal Employers' Liability Act, "we deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress and susceptible of adjudication according to the prevailing rules of procedure." *Mondou* v. *New York, N. H. & H. R. Co.*, 223 U. S. 1, 56-57. "As to the grant of jurisdiction in the Employers' Liability Act, that statute does not purport to require State Courts to entertain suits arising under it, but only to empower them to do so, so far as the authority of the United States is concerned. . . . But there is nothing in the Act of Congress that purports to force a duty upon such courts as against an otherwise valid excuse." *Douglas* v. *New York, N. H. & H. R. Co.*, 279 U. S. 377, 387-88. And see *Chambers* v. *Baltimore & Ohio R. Co.*, 207 U. S. 142, 148-49; *St. Louis I. M. & S. Ry. Co.* v. *Taylor*, 210 U. S. 281; *John* v. *Paullin*, 231 U. S. 583.

The plight of petitioners is not due to any failure of the State of Illinois to provide forums adequate for the hearing of their cases under the federal statute. The state provides a system of circuit courts sitting in each of its counties which have general and unlimited original jurisdiction at law and in equity. These were open to the petitioners, but they chose instead to file their complaints in city courts. It would not be open for us to say that the state in setting up a local court could not limit its jurisdiction to actions arising within the city for which it is established.

When the Supreme Court held these courts without jurisdiction, plaintiffs moved in City Court under the Illinois Venue Act (Illinois Revised Statutes, 1941, ch. 146, § 36) to change venue to the Circuit Court. The City Courts granted the motion and transferred the papers to the Circuit Court. The defendants were served with no process issuing from the Circuit Court, entered no general appearance in Circuit Court. Instead, appearing specially, they moved to dismiss. In each case the motion was grounded in a complete absence of jurisdiction in

the City Courts to begin, hear, or transfer the case. Each defendant denied that the Venue Act gave any power to the City Court to transfer, and each claimed that if it did, it would be unconstitutional under the State Constitution. Both also asserted that the federal statute of limitations had run at the time of purported change of venue because no suit had been "commenced" in City Court within its meaning.

The Supreme Court of Illinois did not decide whether under the State Constitution the Venue Act was unconstitutional, apparently because it held the Act not to apply. It pointed out that "both the subject matter and the parties must be before the court, and jurisdiction of the one without the other will not suffice; the two must concur or the judgment will be void in any case in which the court assumes to act." The Circuit Court had served no summons on defendants, and they made no general appearance therein. On the other hand, the City Court admittedly had no jurisdiction of the subject matter. The Supreme Court used language which can mean that no valid proceeding was pending in either court as a matter of state law.[2] We think that the Supreme Court probably has decided that as matter of Illinois law no action is pending against these defendants in any court and that all of the proceedings have been of no effect whatever.

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[2] "The question involved relates to the effect of the proceedings had in a court wholly incompetent to render a valid judgment, because if the judgment to be rendered would be void it necessarily follows the preliminary proceedings of the court, necessary to rendition of judgment, must likewise be void. If the court has no jurisdiction of the subject matter for judgment there can be no jurisdiction giving effect to process or pleadings.

* * *

The fallacy of [plaintiff's] argument rests in the fact that it becomes necessary to give validity to proceedings in a court, the judgment of which, if rendered upon such proceedings, would be wholly void. If the ultimate object to be obtained in a suit at law, viz., a judgment, is utterly void, it is difficult to understand how any of the preliminaries to such a judgment, such as summons, pleadings, interlocutory orders and the like have any effect, when the result, had such a proceeding been concluded in the first court, would have been a nullity.

* * *

. . . if appellant's contention is sustained, a valid judgment could be obtained by transferring the cause to the proper court upon a summons or notice that defendants could safely disregard when served upon them. This would give the order to transfer by the city court the effect of vitalizing process that was void and considering a case commenced and pending in a proper court during a period when, in legal contemplation, no judicial control of fendants had yet been exercised.

* * *

It is clear a suit was not commenced by filing the present suit in the city court of Granite City, or by issuing summons or filing a complaint. Lacking requisite jurisdiction because of the provisions of the constitution

The freedom of the state courts so to decide is, of course, subject to the qualification that the cause of action must not be discriminated against because it is a federal one. *McKnett v. St. Louis & S. F. Ry. Co.*, 292 U. S. 230. But we cannot say that the court below, in so far as it did hold the city courts without power, construed the state jurisdiction and venue laws in a discriminatory fashion. In *Central Illinois Public Service Co.* v. *Industrial Commission*, 293 Ill. 62, and *Gill* v. *Lynch*, 367 Ill. 203, which are cited to us by petitioners, the Illinois court did uphold the power of one court to transfer a cause to another court for certain purposes. One case, however, involved a proceeding begun in a circuit court, a court of general and unlimited jurisdiction. It issued a writ of certiorari to review a decision of the state compensation commission; transfer was made under the venue statute to another circuit court because the review statute required the proceeding to be in a county where the defendant resided or could be found. In the other case a receivership proceeding was transferred from county court to the circuit court because the county court was without equitable jurisdiction. Thus neither case involved the jurisdiction of a city court nor the application of the venue statutes to a city court. Therefore, the cases are too dissimilar in their facts to make this one appear to be a discrimination against a federal right whether or not they are wholly consistent with some of the language in the present case. And there is no other basis, in the opinion of the court or elsewhere, for the intimation that if petitioners' cases had been brought under state statutes or common law they would not have been dismissed under the same circumstances as those here present.

Had the Supreme Court rested upon its observations about the jurisdiction of Illinois courts and the adequacy of their procedures to bring an action into existence, we should be without power to direct these courts to try cases which as matter of local law are not pending. But the Court did not stop at that.

Second. The case went to the Supreme Court of Illinois with a certification by the Circuit Court that a federal question was involved. The federal question, whether the action was barred by the federal statute of limitations, was raised by respondents in

limiting it to cases arising within the limits of the city, such court was wholly incompetent to render any judgment or to authorize any proceedings which would result in a judgment."

their motion to dismiss in the Circuit Court. In the course of its opinion the Illinois Supreme Court used language from which it seems reasonably clear that the question was decided,[3] either necessarily, because the Court had not disposed of the case on state law grounds, or hypothetically. For purposes of passing on this question the Court seems to have assumed that an action is pending under state law; for only if one is pending is there occasion to consider whether the cause of action is barred.

Petitioners contend therefore that the judgment below does not rest upon a state ground but upon an erroneously decided federal ground—namely, that even though the City Court had power to transfer the case, the action is barred because not "commenced" until it arrived in Circuit Court.

Third. This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. *Murdock* v

[3] "The material point for consideration is whether the plaintiff has commenced an action within two years of the date of his injury in a court having jurisdiction to hear and determine the same, as required by section 6 of the Federal Employers' Liability Act . . .

* * *

. . . we observe recovery under the Federal Employers' Liability Act is conditioned upon two things: (1) commencing an action within two years from the date of the injury; and (2) commencing such action in a court having jurisdiction to hear and determine the same. . . . The plaintiff having predicated his case upon the Federal Employers' Liability Act must comply with its provisions, both with respect to the time of commencing the suit and of bringing it in a court having jurisdiction to hear and determine it.

* * *

Conceding, but not deciding, that in proper cases a court without jurisdiction of the subject matter could be authorized by statute to transfer its proceedings . . . still the condition that the action be commenced within two years is not met . . . such statutes cannot recreate a right given under a Federal statute that has ceased to exist by the terms of the (Federal) statute.

* * *

In this case jurisdiction of the suit was wholly lacking *until* July 31, 1942 (if we consider the change of venue act valid), and at this time the condition imposed upon the plaintiff with respect to bringing his suit had expired by lapse of time. This determination *makes it unnecessary to pass upon either the constitutional question involved or the validity of the change of venue statute.*" [Italics supplied.]

In the Belcher case the court said:

"Upon parallel facts, Herb v. Pitcairn, No. 27275, decided this day, holds that an action is not commenced within two years of the date of injury in a court of competent jurisdiction, as prescribed by section 6 of the Federal Employers' Liability Act, by transferring the cause from a city court having no jurisdiction of the subject matter at a date when the action, if instituted originally on such date in the circuit court, could not be maintained because not commenced within the statutory time. Our disposition of the identical issue in Herb v. Pitcairn is decisive here."

Memphis, 20 Wall. 590, 636; *Berea College* v. *Kentucky*, 211 U. S. 45, 53; *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 164; *Fox Film Corp.* v. *Muller*, 296 U. S. 207. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion. If the Illinois court means to hold that the city courts could not adjudge, transfer, or begin these cases and that no case is pending in its courts at the present time, it is manifest that no view we might express of the federal Act would require its courts to proceed to the trial of these actions.

But what to do with cases in which the record is ambiguous but presents reasonable grounds to believe that the judgment may rest on decision of a federal question has long vexed the Court. In many cases the answer has been a strict adherence to the rule that it must affirmatively appear that the federal question was decided and that its decision was essential to disposition of the case; and that where it is not clear whether the judgment rests on a federal ground or an adequate state one, this Court will not review. *Klinger* v. *Missouri*, 13 Wall. 257, 263; *De Saussure* v. *Gaillard*, 127 U. S. 216, 234; *Johnson* v. *Risk*, 137 U. S. 300, 307; *Wood Mowing & Reaping Machine Co.* v. *Skinner*, 139 U. S. 293; *Adams* v. *Russell*, 229 U. S. 353, 358-61; *Lynch* v. *New York ex rel. Pierson*, 293 U. S. 52.

In other cases where justice seemed to require it, for example because of supervening events, the Court has said that to set aside the judgment and remand the case to the state court for further consideration is not to review, in any proper sense of the term, the decision of the state court. *Patterson* v. *Alabama*, 294 U. S. 600, 607; *State Tax Comm.* v. *Van Cott*, 306 U. S. 511, 515. And in *Minnesota* v. *National Tea Co.*, 309 U. S. 551, uncertainty as to the grounds of the decision below led the Court to vacate and remand for further consideration. *National Tea Company* v. *State*,

205 Minn. 443 and 208 Minn. 607. In *Lynch* v. *New York*, 293 U. S. 52, the Court strongly intimated that had petitioners requested a continuance in this Court to permit an application to the state court for amendment or clarification of its remittitur, there would be power and willingness to grant it. Later, in *International Steel & Iron Co.* v. *National Surety Co.*, 297 U. S. 657, 662, the record failed to disclose that a federal question had been presented or decided. Counsel requested at the bar continuance to apply for amplification, and it was granted. Reargument was had in the state court upon the federal question, the court did pass on it, the further proceedings were certified, and this Court asserted jurisdiction and proceeded to decision. The practice has become common by which some state courts, such as the New York Court of Appeals, provide counsel on motion with a certificate of the court or of the Chief Judge that a stated federal question was presented and necessarily passed upon if such was the case. See, *e. g.*, cases cited in Robertson and Kirkham, Jurisdiction of the Supreme Court, § 75.

It is no criticism of a state court that we are unable to say in a case where both state and federal questions are presented, discussed, and perhaps decided, that the judgment would have been the same had only one of the grounds been present. Those courts may adjudicate both kinds of questions and because it is not necessary to their functions to make a sharp separation of the two their discussion is often interlaced. But we cannot perform our duty to refrain from interfering in state law questions and also to review federal ones without making a determination whether the one or the other controls the judgment. And in cases where the answer is not clear to us, it seems consistent with the respect due the highest courts of states of the Union that they be asked rather than told what they have intended. If this imposes an unwelcome burden it should be mitigated by the knowledge that it is to protect their jurisdiction from unwitting interference as well as to protect our own from unwitting renunciation.

It is our purpose scrupulously to observe the long standing rule that we will not review a judgment of a state court that rests on an adequate and independent ground in state law. Nor will we review one until the fact that it does not do so appears of record. But because we will not proceed with a review while our jurisdiction is conjectural it does not follow that we should not take steps to protect our jurisdiction when we are given reasonable

grounds to believe it exists. We think the simplest procedure to do so, where the record is deficient, is to hold the case pending application to the state court for clarification or amendment. It need not be elaborate or formal if it is clear and decisive in stating whether a federal question, and if so, what federal question, was decided as a necessary ground for reaching the judgment under review. In proper cases we may grant counsel's request for continuance for the purpose. In proper cases we will impose the duty of applying for it upon petitioner or appellants upon our own motion.

These causes are continued for such period as will enable counsel for petitioners with all convenient speed to apply to the Supreme Court of Illinois for amendment, or certificate, which will show whether it was intended to rest the judgments herein on an adequate and independent state ground or whether decision of the federal question was necessary to the judgment rendered.

Mr. Justice BLACK, dissenting.

Far-reaching implications of the Court's action in both these cases impel me to state the reasons for my disagreement.

In November, 1936, Herb (the petitioner in No. 24) lost a leg and suffered other severe injuries. He commenced an action against the railroad in an Illinois City Court, was awarded a verdict, the trial judge entered judgment for the railroad notwithstanding the verdict, and an Illinois intermediate appellate court reversed and directed that judgment be entered for Herb. 306 Ill. App. 583. The Illinois Supreme Court reversed the Appellate Court's judgment insofar as it had directed that a judgment be entered for Herb, and remanded the case to the City Court for the trial judge to pass upon a motion for new trial should one be made. 377 Ill. 405. Although five years had already elapsed since Herb's injuries his efforts to secure a judicial determination of his rights under federal law had just begun.

Apparently, as the lengthy history of Herb's case shows, it had long been assumed by the courts as well as by the legal profession, that Illinois City Courts had jurisdiction to try railroad employees' cases arising under federal law. But after remand of his case to the City Court, the state Supreme Court handed down opinions in two other cases holding that City Courts did not have jurisdiction to hear and determine actions for injuries which occurred

outside their territorial limits.[1] In view of this new obstacle to his action, the petitioner then moved for a change of venue to the Circuit Court, under an Illinois statute authorizing transfer from a "wrong court or county" to a "proper court or county". Ch. 146, Ill. Rev. Stat. 1941, Par. 36. The motion was granted, and in the Circuit Court, the railroad moved to dismiss the cause on the ground that (1) all of the orders of the City Court, including the change of venue, were invalid; (2) the statute authorizing transfer was unconstitutional; (3) the suit had not been "commenced" within two years after the date of the injury as required by Section 6 of the Federal Employers' Liability Act.

The motion to dismiss was sustained and Herb appealed. The Circuit Court Judge's certification to the Illinois Supreme Court recited that the judgment involved construction of the Illinois and United States Constitution, the validity of an Illinois statute, and the validity and construction of Section 6 of the Federal Employers' Liability Act.

The court below in the very first sentence after reciting the facts, stated that "the material point for consideration" was whether the requirements of Section 6 of the Federal Employers' Liability Act had been met. Throughout its entire opinion, the Court construed Section 6 and the City Court's jurisdiction as related to its construction of that section, in order to determine whether or not its requirements had been met. Then, having decided that the action was not "commenced" within the federal statutory period, it summarily disposed of the state questions raised with this one sentence: "This determination makes it unnecessary to pass upon either the [Illinois] constitutional questions involved, or the validity of the [Illinois] change of venue statute."

It is true that the court below held that "proceedings in the City Court were of no effect." In so holding, it did not decide that this fact alone authorized dismissal of the cases from the Circuit Court, which admittedly had jurisdiction to try cases arising under the federal Act. Consequently, it cannot be said that this holding provides an independent state ground for the Circuit Court's dismissal. The only reason why the Circuit Court could dismiss under the State Court's view was because Section 6 of the federal Act required a suit to be "commenced" in two years. This made it necessary for the court to interpret the meaning and

[1] Werner v. Illinois Central R. R. Co., 379 Ill. 559; Mitchell v. Louisville & Nashville R. R. Co., 379 Ill. 522.

scope of "commenced." It construed the word as meaning not only that a suit should be filed within two years of an injury, but that such suit must be filed in a court having jurisdiction to hear and determine the cause. Having thus by construction superimposed this condition on the federal Act, it proceeded to determine whether the City Court had such power. It held that the City Court did not have such power (a state question). Then applying its construction of the federal statute, it decided that the action had not been "commenced" within two years from the date of the injuries (a federal question). All of this shows a determination of federal questions which we should decide.

But this Court says that other language in the state court's opinion indicates that its judgment might really have been rested on a state procedural ground, adequate to support the dismissals. So now, more than eight years after Herb was injured, both cases are to be held here to give counsel an opportunity to ask the state Supreme Court if it "intended to rest the judgments herein on an adequate and independent state ground or whether decision of the federal question was necessary to the judgment rendered." I would not thus lightly abdicate our ultimate responsibility to protect federally created rights. To "admit that the authority to review the action of a State court where it has decided a Federal question can be rendered unavailing by a suggestion that the court below 'may have rested its judgment' on a non-federal ground, would simply amount to depriving this Court of all power to review Federal questions if only a party chose to make such a suggestion." *St. Louis and Iron Mountain Ry.* v. *McWhirter*, 220 U. S. 265, 275, 276.

Furthermore, even a final determination that there was an adequate state procedural ground for dismissal of these particular suits would not end the controversies, although it might protract litigation for five more years. This is true, because it is beyond belief that dismissals on these procedural grounds would bar new actions based on the injuries. And the federal question so clearly presented here and now, could hardly be escaped in new actions. That question is, "Are these suits barred by Section 6 of the Federal Employers' Liability Act"? This question presents a twofold problem: (1) Does Section 6 have any application to these actions; (2) If so, should the word "commenced" be construed so as to make the beginning of the suit in the City Court such a commencement?

As to (1), it is to be noted that both complainants claim damages for violation of the Federal Safety Appliance Act. 27 Stat. 531 *et seq.*; 45 U. S. C. Sec. 1 *et seq.* Violation of the Safety Appliance Act, even without the Federal Employers' Liability Act, gives rise to a cause of action on the part of an employee injured as the proximate result of that violation. *Louisville & Nashville Railroad Co.* v. *Layton*, 243 U. S. 617, 620; *Texas & Pac. Ry.* v. *Rigsby*, 241 U. S. 33, 39. That Act contains no statute of limitations. No authority has been cited to support the proposition that the condition of liability imposed by Sec. 6 of the Federal Employers' Liability Act applies to actions for damages for violation of the Safety Appliance Act. The rule of this Court has been to give the Safety Appliance Act, under which these claims were filed, a liberal construction, and one which will promote, not defeat its purpose. *Swinson* v. *Chicago, St. P., M. and O. Railway*, 294 U. S. 529, 531.

Assuming that petitioners here are to be required to file new suits, and that the two year limitation of Section 6 of the Federal Employers' Liability Act applies to injuries resulting from violation of the Safety Appliance Act, it still must be determined whether filing these suits in the City Courts "commenced" actions within the meaning of that word as used in Section 6.

Certainly the railroads had notice of the suits. They evidently thought they had been "commenced" when they contested them in all the courts of Illinois. The lawyers for all the litigants undoubtedly felt sure that they were trying law suits in proper forums. Neither the Illinois Court of Appeals nor the State Supreme Court which remanded Herb's case to the City Court had any doubt at that time that suits had been "commenced."

The plainest principles of justice demand that these employees be afforded a trial. No reason that can be conceived for erecting a statutory bar of two years justifies an inference that Congress intended that employees who made bona fide efforts to prosecute their claims in a court should be barred because of unanticipated decisions as to jurisdiction. The words of the statute justify the construction that these actions were "commenced" when they were filed in the City Courts. Any other construction results in a frustration of the broad objectives of the Act.

Finally, I can find no warrant whatever for saying that the state Supreme Court may have sustained dismissal on the ground that no suits at all were "pending" in the state Circuit Court.

That court had jurisdiction to try them. The complaints were there. True, they might have been brought there by a City Court Clerk, although so far as the record shows, petitioner's attorneys may have taken them to the Circuit Court. But the state Supreme Court's opinions do not indicate that Illinois law requires that a complaint be physically filed by the hands of no one except an injured person. I shall not believe the state court would make such a holding until it does so.

For special reasons, in addition to those above stated, I think that this Court's action in requiring Belcher (petitioner in No. 25) to obtain some kind of certificate of "intention" from the Illinois Supreme Court is without any conceivable justification. The argument of parties before us and the Court's opinion have treated the *Belcher* case as though the Supreme Court of Illinois had sustained its dismissal and the Herb dismissal, in No. 24, on identical grounds. This treatment of the two cases is not justified unless the State Court's opinion in *Belcher's* case is given a strained interpretation. The *Belcher* opinion did cite the *Herb* opinion as presenting "parallel facts" to those of the *Belcher* case. But the "parallel facts in the two cases upon which the *Belcher* dismissal was premised, were carefully limited by the *Belcher* opinion's statement of the issue to this effect:

"Defendant, appearing specially, made a motion to quash the summons issued by the city court and to dismiss the cause for the reason, among others, that the cause having been ordered transferred to the circuit court on July 17, 1942, more than two years after the date plaintiff suffered his injuries, namely, February 15, 1939, he could neither institute nor maintain his action in the circuit court since it had not been commenced within two years from the day the cause of action accrued, conformably to section 6 of the Federal Employers' Liability Act." *Belcher* v. *L. & N. R. R. Co.*, 384 Ill. 281, 283.

After stating the issue in this limited fashion the *Belcher* opinion then went on to say:

"Upon parallel facts, *Herb* v. *Pitcairn*, *ante*, p. 237, decided this day, holds that an action is not commenced within two years of the date of injury in a court of competent jurisdiction, as prescribed by section 6 of the Federal Employers' Liability Act, by transferring the cause from a city court having no jurisdiction of the subject matter at a date when the action, if instituted originally on such date in the circuit court, could not be maintained because not commenced within the statutory time. Our disposition of the identical issue in *Herb* v. *Pitcairn* is decisive here. *Belcher* v. *L. & N. R. R. Co.*, *supra*, 282-283.

It thus appears that the *Belcher* opinion sustaining dismissal rested squarely and exclusively on the state court's conclusion that the cause of action was barred by Section 6 of the Federal Employers' Liability Act. Notwithstanding this, the Court now, six years after Belcher's injuries, delays a final decision on the applicability of the federal Act, to await a statement from the state court as to whether it would have decided it on a hypothetical state ground had that ground been considered by it in the first instance.

Mr. Justice DOUGLAS and Mr. Justice MURPHY join in this dissent.

Mr. Justice RUTLEDGE, dissenting.

I concur with Mr. Justice BLACK's opinion in so far as it relates to the failure of the Illinois Supreme Court to take account of petitioners' claims based on the Federal Safety Appliance Act. Clearly Section 6 of the Federal Employers' Liability Act does not apply to causes arising under the former Act and, on this ground alone, the judgments should be reversed.

I agree also that the Illinois court has determined the causes under the Employers' Liability Act solely by its view of federal law and that it has done so erroneously. It has held that neither action was "commenced" in time within the meaning of Section 6 and in doing so has interpreted "commenced" to mean begun in a court competent to hear and determine the cause. Under this decision, the causes would not have been commenced, even if similar causes arising under state law were held sufficiently begun, for similar purposes, in identical circumstances. We do not know and cannot know whether local actions so filed and transferred would be barred. We do not know this because, as Mr. Justice BLACK points out, the Illinois Supreme Court expressly disavowed that it had applied or determined the validity of the Illinois venue statutes, which on their face purport to authorize just such transfers as occurred in these causes.[1] Consequently until the validity

[1] The pertinent provisions of the Illinois venue statutes are as follows: "That whenever any suit or proceeding shall hereafter *be commenced, in any court of record* in this state, *and it shall appear* to the court where the same is pending, *that the same has been commenced in the wrong court* or county, *then upon motion* of either or any of the parties to such suit or proceeding, *the court shall change the venue* of such suit or proceeding *to the proper court* of county, *and the same* when the venue shall be so changed *shall be then pro-*

and effect of those statutes are determined, the Illinois court's decision in these cases must be taken to rest wholly upon its view of the meaning of Section 6, entirely independently of the meaning of the state venue statutes, and to be founded solely upon a federal ground.

That ground as the Illinois court decided it is, in my opinion, clearly wrong. It was, apparently, that "commenced" in Section 6 always means "commenced in a court competent to hear and determine the cause," regardless of whether local causes may be sufficiently commenced, for similar purposes, in a court of limited jurisdiction capable of transferring but not of hearing and deciding them. Nothing in Section 6 or the Act so states. On the contrary, when the suit is in a state court, it is to be taken, by fair implication, that whatever is sufficient generally to constitute beginning of suit for other actions is beginning of suit for these. If for instance it should be the state law that local causes are sufficiently commenced from the time of filing the complaint, though in the wrong court for reasons of jurisdiction relating to trial and decision, if nevertheless upon discovery of the error the cause is transferred to another court having complete jurisdiction, nothing in Section 6 or the Federal Employers' Liability Act requires or permits suits brought under that Act to be treated differently. A state may confer upon its courts of limited jurisdiction limited powers over causes they are not competent to hear and decide. A salutary instance would be to safeguard litigants against unwitting loss of their rights of ac-

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tion and triable in such court or county to which the same shall be so changed *the same as in other cases of change of venue:* Provided, that where either party to such suit or proceeding shall procure the change of venue as herein provided for, that the court shall require the plaintiff in said suit to pay all costs in such suit or proceeding, up to and including the costs of the change of venue except such costs, if any there are, as shall have been made or occasioned by answer to the merits and a trial thereon, if any such shall have been had or made, and such costs, if any, caused by answer to the merits and trial thereon shall abide the final result of such suit or proceeding the same as in other cases of change of venue." Ill. Rev. Stat., 1943, c. 146, § 36.

"Change of venue *from city courts*, for the same causes and in the same manner, *may be taken as from circuit courts, and the cases sent to* any other city court, or to *any circuit court, or to any other court of competent jurisdiction* where the cause complained of does not exist; . . . . " Ill. Rev. Stat., 1943, c. 37, § 346.

"The clerk of the court to which the change of venue is granted shall file the transcript and papers transmitted to him and docket the cause, *and such cause shall be proceeded in and determined* in all things, as well before as after judgment, *as if it had originated in such court.*" Ill. Rev Stat., 1943, c. 146, § 16. (Emphasis added.)

tion through stumbling into jurisdictional pitfalls, by providing that actions filed in the wrong court should not be defeated through lapse of time merely because the plaintiff had mistaken his court, if upon discovery of the error, though after the period, the cause were transferred promptly to a fully competent court. Such a provision would merely create either an exception to the statute of limitations or a means of suspending the time of its running. On their face, that is what the Illinois venue statutes purport to do, though whether this is their effect is of course for the state courts to decide.

In any event, such a statute would not be contrary to or inconsistent with Section 6 or any other provision of the Federal Employers' Liability Act. On the contrary, litigants in the state courts under that Act would be entitled to the benefit of such a provision if this were given to litigants having causes arising under state law.

Accordingly, since the Illinois court has held that Section 6 by its own terms requires that the commencing event take place in a court having jurisdiction not only to begin and transfer, but also to hear and to decide, the judgments should be reversed and remanded.

SUPREME COURT OF THE UNITED STATES.

Nos. 24 and 25.—October Term, 1944.

24 Victor J. Herb, Petitioner,
vs.
Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers for Wabash Railway Company.

25 Benjamin F. Belcher, Petitioner,
vs.
Louisville & Nashville Railroad Company.

On Writs of Certiorari to the Supreme Court of the State of Illinois.

[April 23, 1945.]

Mr. Justice Jackson delivered the opinion of the Court.

These cases were heretofore considered and disposition was deferred to enable petitioners to apply for clarification of the grounds upon which the Supreme Court of Illinois intended to rest its judgments. *Herb* v. *Pitcairn* and *Belcher* v. *Louisville & Nashville R. Co.*, decided February 5, 1945.

(March 21, 1945)

That court, responding to petitioners' request, has made clear that its judgment resulted solely from its interpretation of a federal statute of limitations applicable to actions under the Federal Employers' Liability Act which provides: "No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued." 35 Stat. 66, 45 U. S. C. 56; amended to three years, August 11, 1939, 53 Stat. 1404. The court said that it could not pass upon any of the questions contested except to apply the limitation of two years fixed in the last-mentioned statute after deciding whether said cause had been commenced when it was filed in the city court of Granite City, Illinois." And it added: "We observed that section 6 of the Federal Employers' Liability Act required plaintiff to commence an action within two years from the date of the injury; that the city court of Granite City had no jurisdiction of the cause for the reasons set forth in the opinion; and that, under Illinois law, commencement of an action means starting it in a court if it has the power to decide the matter involved, to issue process, to bring the parties to the

particular cause before it and to render and enforce a judgment on the merits of said cause."

We are unable to agree to an interpretation of the federal statute by which a case is not "commenced" for its purposes unless instituted in a court with power to proceed to final judgment. An action is "commenced" for these purposes as a matter of federal law when instituted by service of process issued out of a state court, even if one which itself is unable to proceed to judgment, if the state law or practice directs or permits the transfer through change of venue or otherwise to a court which does have jurisdiction to hear, try, and otherwise determine that cause. Whether the action would be barred if state law made new or supplemental process necessary is a question not involved here and not decided. Clearly however, when process has been adequate to bring in the parties and to start the case on a course of judicial handling which may lead to final judgment without issuance of new initial process, it is enough to commence the action within the federal statute. As these cases were dismissed solely because of a contrary view, the judgments are reversed and the causes remanded to the Supreme Court of Illinois for further proceedings not inconsistent with our opinions herein.